FILE COPY

Office-Supreme Court, U.S.
FILED
APR 2 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1368~~ 1386

DONALD J. MILLER,

Petitioner,

—v.—

NEW YORK STOCK EXCHANGE, AMERICAN STOCK EXCHANGE, PAINE, WEBBER, JACKSON AND CURTIS, and LOUIS LEFKOWITZ, individually and as Attorney General of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PAUL G. CHEVIGNY
New York Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

DONALD J. MILLER
165 Christopher Street
New York, New York

MELVIN L. WULF
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Attorneys for Petitioner

INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes 3

Statement of the Case 4

REASONS FOR GRANTING THE WRIT

I. The case raises important issues of wide application 6

II. The decision below should be reviewed, because it is inconsistent with principles established in rulings of this Court 7

A. Right of Privacy and the Fourth Amendment 7

1. Return of Fingerprint Records 11

2. Restriction of the Class to Be Fingerprinted 12

3. Showing of Need 15

B. Denial of Equal Protection of the Laws 15

C. Due Process of Law 16

D. Requirement of a Three-Judge Court 19

CONCLUSION 21

PAGE

APPENDIX

Opinion of Court of Appeals 23

Opinion of District Court 27

Relevant Statutes 48

TABLE OF AUTHORITIES

Cases:

Camara v. Municipal Court, 387 U.S. 523 (1967) 10, 11, 13, 15, 17

Davis v. Mississippi, 394 U.S. 721 (1969) 8, 9, 10, 11, 13, 17, 19

Ex Parte Poresky, 290 U.S. 30 (1933) 19

Friedman v. Valentine, 30 N.Y.S.2d 899 (Sup. Ct. 1941), aff'd 266 App. Div. 561, 42 N.Y.S.2d 593 (1943) 15

Greene v. McElroy, 360 U.S. 474 (1969) 15

Griswold v. Connecticut, 381 U.S. 479 (1965) 17

IAM v. Street, 367 U.S. 740 (1961) 17

James v. Goldberg, 303 F. Supp. 935 (S.D.N.Y. 1969) 10, 11, 17

NAACP v. Alabama, 357 U.S. 449 (1958) 17

Olmstead v. United States, 277 U.S. 438 (1927) 7

Parker v. Lester, 227 F.2d 708 (9 Cir. 1955) 15

BLEED THROUGH POOR COPY

PAGE

Stanley v. Georgia, 394 U.S. 557 (1969) 7

Thom et al. v. N.Y.S.E. et al., 69 Civ. 4092 (S.D.N.Y.) 4

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 16

Constitutional Provisions:

United States Constitution

First Amendment 17

Fourth Amendment 2, 7, 8, 10, 11, 17

Fourteenth Amendment 2, 16

Statutes:

28 U.S.C. §1254(1) 2

28 U.S.C. §2280 et seq. 4, 19

42 U.S.C. §1983 4

New York Code of Criminal Procedure, 66 McKinney's Consol. Laws of N. Y. Supp. §940 et seq. 3, 4, 11, 16

New York Executive Law, Article 21, 18 McKinney's Consol. Laws of N. Y. Supp. §600 et seq. 5, 14

New York State Civil Rights Law, 8 McKinney's Consol. Laws of N. Y. Supp. §79-e 3, 4, 11, 16

New York State Labor Law, 30 McKinney's Consol. Laws of N. Y. §201-a 3, 4, 7, 15, 16

New York State Laws of 1969, Chaper 1071, 19 McKinney's Consol. Laws of N.Y. Supp. §359-e(12) ....*passim*

COPY BOUND CLOSE IN CENTER

PAGE

Other Authorities:

American Civil Liberties Union, "Thumbs Down" (pamphlet, 1938) 7

Cole, "Arrest Records on Wall St. Found," *New York Times*, 2/5/70, p. 1, col. 2 .....6, 13

Ernst, Morris, "Should We Have Universal Fingerprinting?—A Threat to Personal Liberty," 100 *Forum* 173 (1938) 7

Fried, "Privacy," 77 Yale L.J. 475 (1968) 7

Governor's Message, 2 McKinney's 1969 Sess. Laws of N. Y. 2575 .....5, 6, 13

Morgenthau, Robert M., Remarks at Security Control Conference at New York Hilton, 11/25/69 at 15 18

New York State Identification and Intelligence System, "Crime 68: The NYSIIS Response" 19 14

Wall Street Journal, 2/5/70, p. 17 .....12, 13

Westin, *Privacy and Freedom* 372 (1967) 16, 17

BLEED THROUGH POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

DONALD J. MILLER,

Petitioner,

—v.—

NEW YORK STOCK EXCHANGE, AMERICAN STOCK EXCHANGE, PAINE, WEBBER, JACKSON AND CURTIS, and LOUIS LEFKOWITZ, individually and as Attorney General of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Donald J. Miller respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 2, 1970.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix, *infra,* pp. 23-26. The opinion of the District Court for the Southern District of New York, reported in 306 F. Supp. at 1002, also appears in the Appendix, *infra,* pp. 27-49.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 2, 1970. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether a state statute which provides, without restriction, for fingerprinting all persons in an industry as a condition of employment, violates the right of privacy, the Fourth Amendment, and due process of law.

2. Whether a state statute which provides without restriction for fingerprinting all persons in an industry as a condition of employment, when state law provides narrowly drawn protections for fingerprinting in other cases, violates the Equal Protection Clause of the Fourteenth Amendment.

3. Whether a three-judge court should be convened to determine the constitutionality of a state statute which provides without restriction for fingerprinting all employees in an industry, as a condition of employment.

Constitutional Provisions and Statutes

Chapter 1071 of the New York State Laws of 1969, 19 McKinney's Consol. Laws of N.Y. Supp. §359-e(12), provides:

> "All persons including partners, officers, directors and salesmen employed by a member or a member organization of a National Security Exchange, registered with the federal securities exchange commission and any employee of a clearing corporation affiliated with any such registered National Security Exchange employed on or after September first, nineteen hundred sixty-nine, who are regularly employed within the state of New York shall, as a condition of employment, be fingerprinted. Every set of fingerprints taken pursuant to this subdivision shall be promptly submitted to the attorney general for appropriate processing."

The following statutes are set forth in the Appendix, *infra*, pp. 48-50:

New York State Labor Law, 30 McKinney's Consol. Laws of N.Y. §201-a

New York Code of Criminal Procedure, 66 McKinney's Consol. Laws of N.Y. Supp. §944

New York State Civil Rights Law, 8 McKinney's Consol. Laws of N.Y. Supp. §79-e

Statement of the Case

The present action[1] was brought in the District Court for the Southern District of New York by Donald J. Miller, a lawyer then employed by the defendant Paine, Webber, Jackson and Curtis, a firm associated with the National Security Exchanges, including the defendants American and New York Stock Exchanges. The case is a civil rights action under 42 U.S.C. §1983 for declaratory and injunctive relief against the operation of Chapter 1071 of the New York State Laws of 1969 (19 McKinney's Consol. Laws of N.Y. §359-e(12) (1969), hereinafter referred to as "Chapter 1071"), which is set out above. The plaintiffs in this and the companion case brought on motions to convene a three-judge court pursuant to 28 U.S.C. §2280 *et seq.* for the purpose of declaring the statute unconstitutional as an invasion of privacy, an unlawful search and seizure, a denial of due process of law, and a denial of equal protection of the laws.[2] Temporary restraining orders against the dismissal of the plaintiffs were entered pending the hearing of the motions. The defendants opposed those motions, and made cross motions to dismiss (App. p. 30).

Chapter 1071 required the fingerprinting of all employees in the securities business, new and old alike. Defendants claimed that "in excess of" 50,000 persons were employed

---

[1] The companion case, *Thom et al.* v. *N.Y.S.E. et al.*, 69 Civ. 4092 (S.D.N.Y.) presented the same issues in the District Court but has not been appealed.

[2] At all times relevant to this case, state law forbade the fingerprinting of private employees generally as a condition of employment, N.Y. State Labor Law §201-a, App. p. 50, and provided for the return of fingerprints seized in connection with an arrest, when the defendant is acquitted. N.Y. Code of Criminal Procedure §944 and Civil Rights Law §79-e, App. pp. 48-49.

by firms affiliated with the National Securities exchanges, and that five to six thousand new employees would be fingerprinted each year (App. p. 31) (as it developed, both figures were much larger than these estimates). It was undisputed that Chapter 1071 provides no machinery for the return of the fingerprints, for the limitation of the class of persons to be printed or for alternative means of ascertaining good character. It was further undisputed that, as a matter of law, the fingerprints were to be processed by the New York State Identification and Intelligence System[3] and then to be retained by the state.

Defendants claimed, and the District Court relied upon an especial necessity to test the probity of employees in the securities industry, pointing in particular to an increasing problem of "lost or stolen" securities (App. pp. 31, 34). The Governor's message in support of the bill stated its purposes to be to "combat the infiltration of the securities industry by organized crime and reduce the incidence of securities thefts" (Governor's Message, 2 McKinney's 1969 Sess. Laws of N.Y. 2575, App. p. 33).

On November 18, 1969, the plaintiffs' motions in this and the companion case were denied by the Hon. Edward Weinfeld, the temporary restraining orders were vacated, and the motions to dismiss were granted (App. p. 45). On November 21, 1969, the petitioner Donald J. Miller was dismissed from his employment by the defendant Paine, Webber, Jackson and Curtis for bringing the present action (App. p. 26), and a stay of that dismissal was denied in the District and Circuit Courts. Mr. Miller immediately

[3] Established pursuant to Article 21 of the New York Executive Law, 18 McKinney's Consol. Laws of N.Y. Supp., §600 *et seq.*

appealed, but the plaintiffs in the companion case did not. The Second Circuit affirmed the District Court without further discussion of the issues.

REASONS FOR GRANTING THE WRIT

I.

The case raises important issues of wide application.

Governor Rockefeller, in his message approving Chapter 1071, estimated that 50,000 employees would be affected by it, together with an estimated 10,000 new employees each year. 2 *McKinney's 1969 Sess. Laws of N.Y.* 2575, 2576; App. p. 31. Subsequently, the defendants, the Attorney General of New York, and the New York Stock Exchange announced the results of the law revealing that the number of persons fingerprinted in fact has been and will be much higher. Cole, "Arrest Records on Wall St. Found," *New York Times,* 2/5/70, p. 1, col. 2. Some 86,000 persons had already been fingerprinted at that time, more were expected, and an influx of 50,000 *new* prints, due to employee turnover, is expected each year. Even these figures do not describe the full range of the statute at issue here, and of the case at bar, because there are other fingerprinting laws, both in New York and other states, for employment as well as other purposes, which may be affected (see e.g., appendix to District Court opinion, App. p. 46). Moreover, the notoriety of the present statute will no doubt encourage the proposal of similar statutes for other industries and in other states.

The threat of such mass fingerprinting statutes has been a matter of public controversy for a great many years. In

the 1930's, there was a drive for universal fingerprinting, which provoked opposition, See American Civil Liberties Union, "Thumbs Down" (pamphlet, 1938), Morris Ernst, "Should We Have Universal Fingerprinting?—A Threat to Personal Liberty," 100 *Forum* 173 (1938). New York State's Labor Law §201-a (App. p. 50), to which Chapter 1071 is an exception, was passed to protect working people from discriminatory fingerprinting. The present case thus presents important issues of policy of long standing, which may ultimately affect many thousands of working people. They should be decided now by this Court, if they are not to be decided by default by industry and technology.

II.

The decision below should be reviewed, because it is inconsistent with principles established in rulings of this Court.

A. *Right of Privacy and the Fourth Amendment*

The right of privacy involved here may be defined broadly as "the right to be let alone—the most comprehensive of rights and, the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." Brandeis, *J.*, dissenting, *Olmstead* v. *United States,* 277 U.S. 438, 478 (1927), cited with approval, *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969). The legal framework of protection for this right has been called by one scholar: "that aspect of social order by which persons control access to information about themselves." Fried, "Privacy," 77 *Yale L.J.* 475, 493 (1968). The courts

below have denied that there is any problem of privacy. But a law which compels the indiscriminate fingerprinting of more than 50,000 persons in a major industry, when that population is expected to change at a rate greatly in excess of 10,000 a year without providing any machinery for the return of those fingerprints, presents a substantial constitutional issue.

In *Davis* v. *Mississippi*, 394 U.S. 721 (1969), this Court set forth the outlines of a rule protecting the right of privacy in fingerprints consistent with the provisions of the Fourth Amendment. Justice Warren, speaking for a unanimous Court, said, 394 U.S. at 726-728 (emphasis added):

> Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions." We made this explicit only last Term in Terry v. Ohio, 392 U.S. 1, 19, 20 L.Ed.2d 889, 904, 88 S.Ct. 1868 (1968), when we rejected "the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'"
>
> Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment. It is arguable, however, that because of the unique nature of the fingerprinting process, such detentions might, under *narrowly defined circumstances* be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense. See Camara v. Municipal Court, 387 U.S. 523, 18 L.Ed.2d 930, 87 S.Ct. 1727 (1967). De-

BLEED THROUGH POOR COPY

tention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts which marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the "third degree." Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.

We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest. For it is clear that no attempt was made here to employ procedures which might comply with the requirements of the Fourth Amendment . . .

In the present case, the District Judge, in words approved by the Court of Appeals, maintained that *Davis* was inapplicable to the statute at issue here. In *Davis*, the petitioner had been picked up with other youths and fingerprinted, in

an ultimately successful effort to find fingerprints which matched those at the scene of a crime. The doctrine of the case, the District Court here said " . . . is but another application of the principle that the Fourth Amendment applies to all searches and seizures of the person, no matter what the scope or duration" (App. p. 38). That statement, it is submitted, is precisely correct, and should lead to the conclusion that *Davis* is applicable to this case. The Fourth Amendment strictures on searches and seizures of persons or premises are but one aspect of the law of privacy, and they are not limited to a criminal context. See *James* v. *Goldberg*, 303 F. Supp. 935 (S.D.N.Y. 1969), appeal docketed in this Court, No. 977 (home visits to welfare recipients).

The citation of *Camara* v. *Municipal Court*, 387 U.S. 523 (1967) by this Court in *Davis* in connection with fingerprinting is significant. *Camara* dealt with searches of premises without warrants, for the purpose of detecting Housing Code violations. Although the Court held that a strict adherence to case-by-case probable cause may not be required for administrative inspections, it was also held essential that narrowly drawn standards be provided for the grounds upon which a search is made. Taken together, *Camara* and *Davis* stand for the principle that fingerprinting may not be required upon a dragnet basis, but only upon narrow standards which protect the privacy of those whose fingerprints are taken. Chapter 1071 supplies no standards whatever; it provides for the fingerprinting of every person in the securities business, regardless of the circumstances, and for his dismissal upon his refusal to comply.

Petitioner's position is thus supported by the decisions of this and other Courts providing for a flexible application

BLEED THROUGH POOR COPY

of Fourth Amendment rights in a non-criminal context. Those decisions indicate that if a statute poaches upon an area of privacy protected by the Fourth Amendment, it must be narrowly drawn so as to afford the maximum protection of the person consistent with the state interest. *Camara* v. *Municipal Court, supra; James* v. *Goldberg, supra. Davis* v. *Mississippi, supra,* in particular, holds that, with narrowly drawn exceptions, there is a Fourth Amendment right to be free from compulsory fingerprinting. The required constitutional effort to draw such standards has not even been attempted in the drafting of Chapter 1071, although the nature of at least some of those standards can easily be seen. Consistent with the interests of the state, the law could have, and should have, provided for the return of fingerprints after they are checked against the records, for the limitation of the fingerprint check to a class smaller than all employees associated with any stock exchange firm, and for an opportunity for the individual who objects to being fingerprinted to show that there is no need for his prints. Let us consider each of these at somewhat greater length.

1. Return of Fingerprint Records

Chapter 1071 does not supply even the minimum protections afforded under New York State law for those properly accused, upon probable cause, of a crime. Although the Code of Criminal Procedure provides for the fingerprinting of such persons upon arrest (66 McKinney's Consol. Laws of N.Y., Supp. §940), both the Code (*Id.* at §944) and the State Civil Rights Law (8 McKinney's Consol. Laws of N.Y., Supp., §79-e) App. p. 48 provide for the return of the fingerprint records upon acquittal. There is nothing in Chapter 1071 which provides for the

return of the fingerprints of any employee.[4] If the real purpose of Chapter 1071 were to identify persons with criminal records who apply for jobs, the logical thing for the legislature to have done would have been to provide for the return of the fingerprints whenever no criminal record was found. The failure to do so, in the framework of existing New York State laws (as will be more fully discussed below), implies a broader purpose than the identification of job applicants who have criminal records. It implies that the fingerprint file is to be continuously maintained, so that evidence can be obtained against persons, so that supposed "undesirables" of whatever sort, criminal or otherwise can be excluded from the industry, and so that a general atmosphere of surveillance will prevail.

The District Court branded these points of distinction as "frivolous" and "conjectural," upon the ground that no proof of such improper usages had been made, and that in any case to use the fingerprints for future investigation would be only an "incidental future by-product" (App. p. 43). This holding is bottomed on the erroneous assumption that there is no right of privacy in fingerprints.

2. Restriction of the Class to Be Fingerprinted

Chapter 1071 extends to every employee in the securities business, regardless who he is or what he does. This drag-

---

[4] Petitioner does not concede that the protections afforded the accused under New York's criminal procedure are adequate. They should provide for *automatic* return of fingerprints upon acquittal instead of for return upon application. Too many defendants do not know that their prints can be returned, if there is no conviction, and thus many prints for arrest only remain in the files. Of those dismissed after the massive fingerprinting under the statute at issue here, half had not been convicted. *Wall Street Journal*, 2/5/70, p. 17.

net aspect of the law contradicts the holding in *Davis* v. *Mississippi*, 394 U.S. at 727, that fingerprinting must be confined to "narrowly defined circumstances," and the holding in *Camara* v. *Municipal Court, supra* that searches may not be made, even for non-criminal purposes, unless they are restricted to a class definably within the purposes of the statute. Here, the fingerprinting should be restricted, at the very least, to those upon whom suspicion might reasonably be expected to fall if securities are missing. This might include only those who actually work with the physical shares themselves.[5]

The evils of the dragnet provisions of the statute, in intruding upon privacy without connection to a protectible state interest, are already apparent after six months of the administration of Chapter 1071. If the purpose of the statute, as stated in the Governor's message, 2 McKinney's 1969 Sess. Laws of N.Y. 2575, was to "combat the infiltration of the securities industry by organized crime and to reduce the incidence of securities thefts," its effects so far have been wide of the mark. It has resulted in the dismissal of a few hundred employees whose fingerprint records yielded information upon assorted charges, including sex offenses. Half of them had not even been convicted, but merely arrested in the past (*New York Times*, 2/5/70, p. 1; *Wall Street Journal*, 2/5/70, p. 17). This is typical of the evils inherent in a dragnet system: it damages the lives of many, while contributing nothing to the solution of the crime problem.

---

[5] For example, the printing could have been restricted to "back office" employees who handle trades of securities. App. p. 31. It is likely, as petitioner pointed out in his affidavit that it is possible to make automated "book exchanges" of securities which entirely eliminate the back office problem. App. p. 41.

The problem of surveillance over the backgrounds of employees is exacerbated by the activities of the New York State Identification and Intelligence System (NYSIIS), which, pursuant to Article 21 of the state's Executive Law (18 McKinney's Consol. Laws of N.Y. Supp. §600 *et seq.*), carries out the "appropriate processing" of the fingerprints for the Attorney General under Chapter 1071. According to reports published by the state pursuant to §607 of the Executive Law, 18 McKinney's Consol. Laws of N.Y. Supp. §607, general "intelligence" information, in addition to the naked record of arrests and convictions, is being programmed into the NYSIIS system. The most recent annual report to the Governor, "Crime 68: The NYSIIS Response" at 19, notes a "pilot study," "which included the collection of organized crime intelligence data concerning some 200 individuals of statewide interest, suspected of being involved in organized crime." The report continues at 20:

> Thus the system design, which was finalized in 1968, had provided for strategic assessments and statewide estimates and evaluations: to support and give informational and technical assistance to the efforts of action agencies; and, at the same time, provide logistic assistance to a State organized crime prevention council, as defined in and contemplated by the Omnibus Crime Control and Safe Streets Act of 1968.

Thus any sort of "character" information about employees can be made available to employers; it is but a step from reporting suspicions of "organized" crime to reporting political or other character history. However useful such information may sometimes be, in appropriate cases, access must be strictly limited. The surveillance powers of NYIIS

are limited only by the capacity of its staff and computers, and such powers must be restricted by the narrowest possible application.

3. Showing of Need

It has been repeatedly held that, when governmental security measures interfere with the rights of privacy of an employee, the latter must be afforded the protections of due process. *Parker* v. *Lester,* 227 F.2d 708 (9 Cir. 1955); *Greene* v. *McElroy,* 360 U.S. 474 (1969). Here, for example, the statute might have provided for a hearing board to determine whether those employees who object to being fingerprinted may actually be able to make a showing that there is no need to take their prints, or that in fact there are alternative modes of establishing good character. Such a scheme has been proposed, *Camara* v. *Municipal Court,* 387 U.S. at 539, in the analogous situation where health inspectors seek to enter a home, and the tenant objects; for such cases a modified warrant-system may be established. Here, a hearing system to judge individual objectors was surely not too onerous.

B. *Denial of Equal Protection of the Laws*

New York has recognized the right of privacy in fingerprints in two major ways. First, Section 201-a of the Labor Law, 30 McKinney's Consol. Laws of N.Y. §201-a, App. p. 52, to which the present statute is an exception, forbids the fingerprinting of private employees as a condition of employment.[6] Second, New York statutes which provide

[6] A New York court has said that the purpose of this statute was in fact to forestall a system of surveillance, by preventing blacklisting of labor organizers. *Friedman* v. *Valentine,* 30 N.Y.S.2d 899 (Sup. Ct. 1941), aff'd 266 App. Div. 561, 42 N.Y.S. 2d 593 (1943).

for the fingerprinting of persons lawfully arrested (New York Code of Criminal Procedure, 66 McKinney's Consol. Laws of N.Y. §940 *et seq.*) also carefully provide for the return of those prints if the defendant is acquitted. *Id.* at §944; New York State Civil Rights Law, McKinney's Consol. Laws of N.Y. §79-e, App. p. 48.

The court below, ignoring these statutes, dubbed the equal protection argument "patently frivolous" (App. p. 45). In fact, however, the discrimination against securities employees is totally invidious and irrational. There is no showing that theft is more widespread in the securities business than in any other; the problem affects industry generally.[7] Westin, *Privacy and Freedom* 372 (1967). Moreover, even if there were a reason to exclude all securities employees from the protections of Labor Law §201-a, there is no excuse for affording them fewer protections than even those minimal provisions for return given to persons lawfully arrested. The present law affords less protection to a man employed by the securities industry than to one fairly accused, upon probable cause, of a crime. Cf. *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

C. *Due Process of Law*

The court below (App. p. 42) relied upon the police power of the state to justify Chapter 1071. That holding can be supported only if there is no constitutional protection for one's fingerprints (as the court below ruled). It has been repeatedly held that when a state law affects personal rights protected under the Fourteenth Amendment, it must be narrowly drawn so as to cover *only* the

[7] The figures of losses given by defendants are only of securities "lost or stolen." App. p. 31.

interests of the state. In the First Amendment area, such cases are numerous, e.g. *NAACP* v. *Alabama,* 357 U.S. 449 (1958) (foreign corporation regulation applied to infringe freedom of association), but the rule is applied also to rights of privacy, *Griswold* v. *Connecticut,* 381 U.S. 479, 481-482 (1965), including those under the Fourth Amendment *James* v. *Goldberg, supra; Camara* v. *Municipal Court, supra; Davis* v. *Mississippi, supra.* The federal court must examine the state statute in such cases, to determine whether there is not some way the state can reach its goal, that is less restrictive of personal constitutional rights than the statute. While the power of government to control the conditions of labor is relatively broad, that power, as well, is subject to the rule. *IAM* v. *Street,* 367 U.S. 740 (1961). In his leading work, *Privacy and Freedom* 371 (1967), Alan Westin restated this rule for rights of privacy:

> In deciding whether there are alternative methods less violative of individual and organizational privacy than proposed surveillance devices and processes, *the burden of proof that other techniques are not available should be on those seeking authorization.* (Emphasis supplied.)

Thus the fact that Chapter 1071 creates an unreviewable system of surveillance for all employees and that prints are not returned is important, and it is no answer to say, as the court below said (App. p. 43) that plaintiff has not proved that the prints will be misused, or that some other use is merely a "by-product." Plaintiffs in *James* v. *Goldberg, supra,* were not obliged to show that welfare home visits were abused, nor in *Camara* that health

searches were abused. Where there is a right of privacy it is for the state to justify its infringement.

It appears, moreover, that the state's interest in taking the fingerprints is extremely meager. Chapter 1071 does not meet its stated purposes, according to Robert M. Morgenthau, formerly United States Attorney for the Southern District of New York and a leading law enforcement officer in this field. Mr. Morgenthau said (Remarks of Robert M. Morgenthau at Security Control Conference at New York Hilton, 11/25/69 at 15-16):

> Careful screening of job applicants is necessary, particularly where in the course of anticipated employment the applicant will have physical access to certificates. I understand that fingerprinting of applicants is becoming a standard practice with a view towards determining the existence of a criminal background.
>
> Let me insert a word of caution in this respect. None of the back-office employees convicted in our court had prior criminal records. A fingerprint check would not have denied them employment.
>
> Let me add this also. As a society we have committed ourselves to equal opportunity for all citizens. It is a matter of fact that many of those who have not had equal economic opportunity have at some youthful time violated the law and have thereby obtained a criminal record. It would be too bad, it seems to me, if a reliance upon a criminal record as a bar to employment served to deprive our disadvantaged of the chance to earn an honest living.
>
> Moreover, such a result would deprive the investment community of a pool of able and potentially able employees at a time when recruitment for clerical work

has become a major problem. We must remember our history and experience as a nation which teaches that the poor often are the most productive workers once given the opportunity to earn a decent wage.

Furthermore, the uncontradicted statement of the plaintiff (App. p. 41) outlined alternative methods of security which are probably less restrictive of the individual and actually more effective in attaining the purposes of the statute. It is no answer to say, as did the court below that the decision to institute these proposals "rests with the Legislature" (App. p. 42), because here there is a right of privacy, albeit qualified, and accordingly, the legislature is bound to draw a narrow statute.

D. *Requirement of a Three-Judge Court*

In deciding whether to convene a three-judge court to consider the constitutionality of a state statute under 28 U.S.C. §2280 *et seq.*, this court has said that a single judge should not dismiss the claim unless "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex Parte Poresky*, 290 U.S. 30, 32 (1933). The decisions of this Court plainly do not exclude Chapter 1071 from controversy; on the contrary *Davis* v. *Mississippi, supra* reopened the matter to controversy.

Apart from decisions of this court, it is clear that a number of questions raised by Chapter 1071 presented triable issues of fact, which should have been resolved by a hearing before a three-judge court.

1. The "appropriate processing" to which fingerprints are to be subjected under Chapter 1071 presents a triable issue as to the resulting surveillance over the lives of employees under applicable state laws, especially, as we have seen (*supra*, p. 14) when the prints are retained and the files of the State Identification and Intelligence System may contain undetermined "intelligence" information. This is a most serious matter, which cannot be dismissed out of hand.

2. There is a substantial question whether the restrictions on Chapter 1071 proposed by the petitioner would not serve the interests of defendants just as well as the present statute. There is reason to believe that limitation of the class to be printed, return of the prints, and alternative proof of character for objectors will suit those interests, and accordingly, a hearing should have been held to show that fact. When, as here, rights of privacy are involved the consideration of alternatives are essential to a determination as to the constitutionality of the act.

3. Equally relevant is the tenuous connection between fingerprinting and the act's stated purpose of preventing thefts of securities. Plaintiff claims, and was prevented from proving, that there are superior methods, less restrictive of privacy, for controlling the flow of securities. It is unlikely, furthermore, that the present act would weed out many, if any, swindlers and plaintiff should have an opportunity to prove it. The ill-conception of a statute may not ordinarily be of constitutional dimensions, but it clearly is so when rights of privacy are in the balance.

There are thus a number of issues relating to the constitutionality of Chapter 1071, for which it was essential that a three-judge court be convened.

CONCLUSION

For the foregoing reasons, a writ of certiorari to review the decision below should be granted.

Respectfully submitted,

PAUL G. CHEVIGNY
New York Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

DONALD J. MILLER
165 Christopher Street
New York, New York

MELVIN L. WULF
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Attorneys for Petitioner



APPENDIX

APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 471—September Term, 1969.

(Argued December 19, 1969 Decided January 2, 1970.)

Docket No. 34329

DONALD J. MILLER,

Plaintiff-Appellant,

—against—

NEW YORK STOCK EXCHANGE, AMERICAN STOCK EXCHANGE, PAINE, WEBBER, JACKSON & CURTIS, and LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York,

Defendants-Appellees.

Before:

FRIENDLY, SMITH and ANDERSON,

Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Edward Weinfeld, *Judge,* denying a motion to convene a three-judge court and dismissing the complaint in an action to enjoin the enforce-

ment of a New York statute requiring the fingerprinting of all New York employees of members or affiliates of national securities exchanges. Affirmed.

PAUL G. CHEVIGNY, Esq. (New York Civil Liberties Union, New York, New York, of Counsel), *for Plaintiff-Appellant.*

BRENDA SOLOFF, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Albany, New York, and Samuel A. Hirshowitz, First Assistant Attorney General, of Counsel), *for Defendant-Appellee, Attorney General of the State of New York.*

ANDREW J. CONNICK, Esq. (Milbank, Tweed, Hadley and McCloy, New York, New York, and Adlai S. Hardin, Jr., of Counsel), *for Defendant-Appellee New York Stock Exchange.*

MILTON WEISS, Esq. (Beekman and Bogue, New York, New York, of Counsel), *for Defendant-Appellee Paine, Webber, Jackson and Curtis.*

PER CURIAM:

This action was brought in the District Court for the Southern District of New York for declaratory and injunctive relief against the operation of Ch. 1071 of N. Y. Laws, 1969, codified as N. Y. General Business Law §359-e (12). This provides that all persons employed in New York

by a member or a member organization of a national security exchange registered with the Securities and Exchange Commission or by a clearing corporation affiliated with any such registered exchange shall, as a condition of employment, be fingerprinted. The fingerprints so taken are to "be promptly submitted to the attorney general for appropriate processing." Judge Weinfeld denied plaintiff's request to convene a three-judge court, 28 U.S.C. §2281, and his motion for a temporary injunction, and dismissed the complaint.

We find it impossible to add to Judge Weinfeld's thorough and well-considered opinion, holding that the statute was a reasonable exercise of the State's power to deal with the serious problem of thefts in the securities business. There is, of course, the question, inevitably encountered in the mounting number of cases like this, whether even though we unanimously agree with the district judge, we must nevertheless reverse because the result was not so clearly predestined that he could dispense with having two other judges, possibly two of us, help him reach it—and this even though the State, for whose benefit the three-judge provision was enacted, was quite content to have him act alone. On this vexing question we can only refer to what was said in *Green* v. *Board of Elections of City of New York,* 380 F.2d 445, 448-49 (2 Cir. 1967), *cert. denied,* 389 U.S. 1048 (1968).

We add one further point: Plaintiff Miller submitted an affidavit in the district court alleging that, a few days after that court's decision, he was dismissed by his employer, Paine, Webber, Jackson and Curtis, specifically because of his having brought this suit. The judge denied his motion to stay the dismissal pending appeal. At the

argument here counsel for the employer conceded that Miller's bringing this action was one cause of his dismissal, although avowedly not the sole one. Our affirmance is not to be taken as foreclosing Mr. Miller from advancing a claim that dismissal for asserting a constitutional contention in a court of the United States was unlawful. In saying this, we are not to be understood as holding that such a claim would be legally sustainable.

Affirmed.

Opinion of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Civil 4092

JOHN THOM and R. J. FLYNN,

Plaintiffs,

—against—

NEW YORK STOCK EXCHANGE, AMERICAN STOCK EXCHANGE, GOLDMAN SACHS AND COMPANY, SHIELDS AND COMPANY, and LOUIS LEFKOWITZ, individually and as Attorney General of the State of New York,

Defendants.

69 Civil 4205

DONALD J. MILLER,

Plaintiff,

—against—

NEW YORK STOCK EXCHANGE, AMERICAN STOCK EXCHANGE, PAINE, WEBBER, JACKSON AND CURTIS, and LOUIS LEFKOWITZ, individually and as Attorney General of the State of New York,

Defendants.

PAUL G. CHEVIGNY, Esq.
New York Civil Liberties Union
156 Fifth Avenue
New York, New York

Attorney for Plaintiffs

MILBANK, TWEED, HADLEY & MCCLOY, Esqs.
1 Chase Manhattan Plaza
New York, New York

Attorneys for Defendant
New York Stock Exchange

ANDREW J. CONNICK, Esq.
ADLAI S. HARDIN, JR., Esq.
EDWARD J. HARDIN, Esq.
Of Counsel

FORSYTHE, MCGOVERN, PEARSON & NASH, Esqs.
86 Trinity Place
New York, New York

Attorneys for Defendant
American Stock Exchange

GORDON L. NASH, Esq.
Of Counsel

SULLIVAN & CROMWELL, Esqs.
48 Wall Street
New York, New York

Attorneys for Defendant
Goldman, Sachs and Company

DAVID S. HENKEL, Esq.
Of Counsel

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD, Esqs.
140 Broadway
New York, New York

Attorneys for Defendant
Shields and Company

LEONARD JOSEPH, Esq.
Of Counsel

BEEKMAN & BOGUE, Esqs.
5 Hanover Square
New York, New York

Attorneys for Defendant
Paine, Webber, Jackson & Curtis

MILTON WEISS, Esq.
Of Counsel

HON. LOUIS J. LEFKOWITZ
Attorney General of the State of New York
80 Centre Street
New York, New York

Defendant

SAMUEL A. HIRSHOWITZ, Esq.
First Assistant Attorney General

BRENDA SOLOFF
Assistant Attorney General
Of Counsel

EDWARD WEINFELD, *D.J.*

These are two actions wherein three plaintiffs challenge the constitutionality of New York State's recently enacted

law, Chapter 1071, [1969] Laws of New York,[1] which requires all employees of member firms of national security exchanges registered with the Securities and Exchange Commission and employees of affiliated clearing corporations to be fingerprinted as a condition of employment. The plaintiffs are a lawyer, a computer programmer and an executive dining room employee, each employed by a different stock exchange firm. Named as defendants are these employers, the Attorney General of the State of New York and the New York and American Stock Exchanges.

The plaintiffs move for a preliminary injunction to enjoin the defendants from enforcing the statute, which became effective September 1, 1969, and for the convening of a three-judge court pursuant to 28 U.S.C., sections 2281, 2284. A temporary restraining order is in effect. The defendants move to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim on which relief can be granted.

Plaintiffs contend that the statute is unconstitutional in that it constitutes: (1) an invasion of privacy in violation of the Ninth and Fourteenth Amendments; (2) an illegal search and seizure in violation of the Fourth Amendment; (3) punishment without due process of law in violation of the Fourteenth Amendment, and (4) an invidious and irrational discrimination against employees of member firms of national security exchanges, resulting in denial of equal protection of the laws in violation of the Fourteenth Amendment.

The single narrow issue on the motion for a three-judge court is whether one or more of the constitutional claims

---

[1] Codified at N.Y. Gen. Bus. Law § 359-e(12) (McKinney Supp. 1969).

are of substance and present a basis for equitable relief.[2] After careful consideration of the complaint and plaintiffs' contentions in support thereof, the Court concludes the questions presented lack the necessary constitutional substance, and accordingly denies the motion for a three-judge court and grants the defendants' motion to dismiss.

We first turn to the evils which gave rise to the statute and the means by which the state sought to meet them.[3] Chapter 1071 was enacted to meet problems that have bedeviled an industry and concerned the state—the year by year increase in stolen or lost securities. The evils of rising thefts in the securities industry have followed in the wake of a tremendous expansion in the daily volume of stock exchange transactions, resulting in an increase in the number of persons employed in the "back office" or clerical area. In 1967 the average daily transactions in the New York Stock Exchange alone totalled ten million shares a day; in 1968 the daily average was thirteen million shares, an increase of thirty per cent in one year. The volume of increase from 1963 to 1968 was seventy-five per cent. When the statute was passed in May 1969 it was estimated that the number of persons employed in the business was close to 50,000, with 6,000 employees added in 1968; that the yearly number of applicants for positions in the industry average about 10,000.

During the period of the expanded volume in transactions and the increase in personnel, the number of securities lost or stolen reached staggering amounts: whereas in 1966 the total amount of such securities was slightly over

---

[2] Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962); *Ex Parte* Poresky, 290 U.S. 30 (1933).

[3] *See* DeVeau v. Braisted, 363 U.S. 144, 147 (1960).

nine million dollars, in 1967 and again in 1968 the total of lost or stolen securities soared to thirty-seven million dollars. Hardly a day passed without the press carrying reports of the theft or disappearance of securities from brokerage houses, ofttimes running into the hundreds of thousands, and at times millions, of dollars. The depredations involved not only persons who had immediate access to the securities, but others who illicitly received and disposed of them.

Existing procedures to obtain background information of prospective employees in the industry had not proved altogether effective. SEC Rule 17a-3(a)(12)[4] requires most members (with limited exception) of registered exchanges to maintain extensive employee records, including arrests, indictments or convictions for all crimes except traffic offenses. The rule also applies to partners, officers, directors, managers and all persons handling funds or securities. A separate rule of the New York Stock Exchange requires its members and member organizations to verify and maintain employee records containing, among other matters: (1) a recent photograph; (2) a signature exemplar; and (3) the information required by SEC Rule 17a-3(a)(12) for three years after termination of employment.[5] Despite these regulations, theft of securities occurred involving employees with criminal records undisclosed at the time of their employment. Efforts by security industry representatives to exchange information with the Federal Bureau of Investigation, as authorized by 28 C.F.R. § 0.85 (1969), or to enlist the aid of the New York City Police Department in verifying the background information failed

[4] 17 C.F.R. § 240.17a-3(a)(12) (1969).

[5] N.Y.S.E. Rule 345.19.

because of insufficient funds and inadequate personnel. The Legislature responded to the situation by enacting the statute, which provides:[6]

> "All persons including partners, officers, directors and salesmen employed by a member or a member organization of a National Security Exchange, registered with the federal securities exchange commission and any employee of a clearing corporation affiliated with any such registered National Security Exchange employed on or after September first, nineteen hundred sixty-nine, who are regularly employed within the state of New York shall, as a condition of employment, be fingerprinted. Every set of fingerprints taken pursuant to this subdivision shall be promptly submitted to the attorney general for appropriate processing."

The Governor, in approving the bill, after noting the tremendous increase in the volume of securities transactions and the corresponding increase in the number of employees engaged in the securities industry in New York State, added:[7]

> "It has been learned recently that several securities thefts from member organizations of registered national security exchanges have been perpetrated with the aid of new back office or clerical employees with previously undisclosed criminal records.
>
> "The fingerprint checks required by this bill will significantly aid employers in the securities industry

---

[6] Law of May 26, 1969, ch. 1071, § 1, [1969] Laws of N.Y. (codified at N.Y. Gen. Bus. Law § 359-e(12) (McKinney Supp. 1969)).

[7] 2 McKinney's 1969 Sess. Laws of N.Y. 2575, 2576 (Governor's memorandum approving the bill).

in evaluating prospective employees' qualifications for employment in an industry requiring the highest standards of integrity and in weeding out those with criminal backgrounds."

Thus, the legislation was designed to meet a specific and worsening problem in the securities industry. That the securities industry is a business affected with a public interest and that the state has a legitimate concern with the problem of ever-mounting thefts in the industry is not disputed.[8] And likewise not open to challenge is the state's power to take reasonable steps to prevent or reduce thefts, embezzlement and related crimes, and to combat the intrusion of criminal elements in the industry by providing a means of identification of persons with criminal backgrounds who work or apply for work in the industry.[9] Fingerprints have long been recognized as a scientific and accurate means of identification.[10] The statute provides a simple method for security industry employers confronted with the problem of shifting personnel and mounting crime to verify at slight inconvenience to employees and applicants for employment the information submitted by them. Upon its face, it appears reasonably calculated to meet the

---

[8] *Cf.* Nebbia v. New York, 291 U.S. 502 (1934).

[9] *See* Staten Island Leaders, Inc. v. Waterfront Comm'n, 117 F. Supp. 308 (S.D.N.Y. 1953), *aff'd per curiam*, 347 U.S. 439 (1954); Linehan v. Waterfront Comm'n, 116 F. Supp. 683 (S.D. N.Y. 1953), *aff'd per curiam*, 347 U.S. 439 (1954); *cf.* DeVeau v. Braisted, 363 U.S. 144 (1960).

[10] Stevenson v. United States, 380 F.2d 590, 592 (D.C. Cir.), *cert. denied*, 389 U.S. 962 (1967); United States v. Kelly, 55 F.2d 67, 69 (2d Cir. 1932); Medias v. City of Indianapolis, 216 Ind. 155, 23 N.E.2d 590 (1939); Roesch v. Ferber, 48 N.J. Super. 231, 137 A.2d 61, 66 (1957).

evils toward which it was directed without imposing any undue burden upon individuals, and consequently represents a valid exercise of the state's police power.[11]

Plaintiffs, however, dispute that the statute is a reasonable exercise of police power to regulate business; they say that the standards derived from cases involving economic interests are inapplicable here and cannot save the statute. Their separate claims that Chapter 1071 is void for invasion of privacy, denial of due process and unlawful search and seizure are interrelated, but the principal assault centers about the invasion of their right of privacy—the right not to be fingerprinted absent a criminal charge or other compelling state purpose. Plaintiffs argue that there is such a right of privacy in fingerprints; that fingerprints are a system of social control, of intrusion upon one's past and future life, and accordingly, that the state must show strong justification for such an intrusion, which they contend is here lacking.[12]

This claim of privacy rests principally upon *Davis* v. *Mississippi*.[13] In *Davis* the Supreme Court barred a "dragnet" fingerprinting of youths in an attempt to identify a rapist. Plaintiffs assert that *Davis* clearly establishes the right of privacy and that the right is not confined to criminal cases. Their assault upon the Act based upon *Davis* runs in many directions: That fingerprinting is an indignity to their person and privacy; that it constitutes "dragnet" fingerprinting, since without adequate standards it indiscriminately applies to all persons in the securities in-

---

[11] Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-96 (1962).

[12] *Cf.* A. Westin, Privacy and Freedom 57-63 (1967).

[13] 394 U.S. 721 (1969); *see* Griswold v. Connecticut, 381 U.S. 479 (1965).

dustry; that other and more effective means involving less intrusion upon individual privacy could have been devised by the state; that no provision is made for the return of the fingerprints after they have served their purpose.

Plaintiffs' essential reliance upon *Davis* v. *Mississippi* is misplaced. *Davis* was concerned with methods used in obtaining fingerprint evidence during the course of a criminal investigation.[14] It is but another application of the principle that the Fourth Amendment applies to all searches and seizures of the person no matter what the scope or duration.[15] It holds that in the circumstances there presented the detention for the sole purpose of fingerprinting was in violation of the Fourth Amendment ban against unreasonable search and seizure. It is inapposite to the situation here presented. Similarly inapposite is *Griswold* v. *Connecticut*,[16] upon which plaintiffs also rely. The right of marital privacy at the core of the Court's ruling in *Griswold* is in no sense analogous to the instant claim of privacy.

Plaintiffs' contention that fingerprinting is an affront to their dignity and an invasion of their privacy is without substance. The day is long past when fingerprinting carried with it a stigma or any implication of criminality. Federal and state courts alike, in upholding fingerprinting requirements, have rejected any such view.[17] Our Court of

---

[14] *See* Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1958).

[15] *See* Terry v. Ohio, 392 U.S. 1 (1968).

[16] 381 U.S. 479 (1965).

[17] *See* Stevenson v. United States, 380 F.2d 590, 594 n.12 (D.C. Cir.), *cert. denied*, 389 U.S. 962 (1967); United States v. Krapf, 285 F.2d 647 (3d Cir. 1961); Walton v. City of Atlanta, 181 F.2d 693 (5th Cir.), *cert. denied*, 340 U.S. 823 (1950) (fingerprinting of taxi drivers); United States v. Laub Baking Co., 283

Appeals, almost forty years ago, in upholding the right of federal agents to take fingerprints after an arrest upon probable cause, even in the absence of statutory authority, observed, "Finger printing is used in numerous branches of business and of civil service, and is not in itself a badge of crime." [18] To the same effect is a state court's contemporaneous opinion upholding a regulation requiring fingerprinting for the issuance of a license to deal in secondhand articles.[19]

F. Supp. 217 (N.D. Ohio 1968); United States v. New Orleans Chap., Assoc. Gen. Contractors, 238 F. Supp. 273, 278-79 (E.D. La. 1964), *rev'd on other grounds*, 382 U.S. 17 (1965); Sterling v. City of Oakland, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962); State *ex rel.* Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946); *id.* 225 Ind. 360, 74 N.E.2d 914 (1947), *appeal dismissed*, 333 U.S. 834, *rehearing denied*, 333 U.S. 858 (1948); Medias v. City of Indianapolis, 216 Ind. 155, 23 N.E.2d 590 (1939) (pawnbrokers and second-hand dealers required to keep and submit to police department cards with fingerprints of everyone from whom they receive or buy property); City of Wichita v. Wolkow, 110 Kan. 127, 202 P. 632 (1921) (pawnbrokers and second-hand dealers required to keep and submit to police department register with fingerprints of everyone from whom they receive or buy property); Norman v. City of Las Vegas, 64 Nev. 38, 177 P.2d 442 (1947) (fingerprinting of employees in establishments selling alcoholic beverages for on-premises consumption); Roesch v. Ferber, 48 N.J. Super. 231, 137 A.2d 61 (1957); Simone v. Kennedy, 26 Misc. 2d 748, 212 N.Y.S.2d 838 (Spec. T. 1961) (fingerprinting of employees in cabarets); Friedman v. Valentine, 177 Misc. 437, 30 N.Y.S.2d 891 (Sup. Ct. 1941), *aff'd*, 266 App. Div. 561, 42 N.Y.S.2d 593 (1943) (fingerprinting of employees in cabarets); Bridges v. State, 247 Wis. 350, 19 N.W.2d 529, 539, *rehearing denied*, 247 Wis. 350, 19 N.W.2d 862 (1945); *cf.* United States v. Kalish, 271 F. Supp. 968 (D.P.R. 1967) (objection based solely upon inclusion in criminal file).

[18] United States v. Kelly, 55 F.2d 67, 70 (2d Cir. 1932).

[19] M. Itzkowitz & Sons v. Geraghty, 139 Misc. 163, 247 N.Y.S. 703 (Spec. T. 1931). A contrary conclusion was reached in two even earlier lower court cases in New York. Gow v. Bingham, 57 Misc. 66, 107 N.Y.S. 1011 (Spec. T. 1907) (dictum); People

Fingerprinting in noncriminal contexts today is even more widespread. It is required of all employees of United States government agencies and departments.[20] As far back as 1910, the New York City Municipal Service Commission adopted fingerprinting as a means of identification, so that today there are thousands upon thousands of fingerprints of city employees on file with the Commission.[21] In Maine all school children must be fingerprinted.[22] In Pennsylvania all babies must be footprinted

---

v. Hevern, 127 Misc. 141, 215 N.Y.S. 412 (Mag. Ct. 1926). *See also* Hawkins v. Kuhne, 153 App. Div. 216, 137 N.Y.S. 1090 (1912), *aff'd*, 208 N.Y. 555, 101 N.E. 1104 (1913); Fidler v. Murphy, 203 Misc. 51, 113 N.Y.S.2d 388 (Sup. Ct. 1952) (fingerprinting in case not provided for by law constitutes cause of action for assault). But the dictum in the *Gow* case, which ultimately held only that petitioner had mistaken his remedy, may be read as indicating only that fingerprinting was a sufficient intrusion into personal liberty to require legislative authorization. Such authorization was subsequently provided in criminal cases, *see* N.Y. Code Crim. Proc. § 940 (McKinney Supp. 1969), and is clearly granted by ch. 1071. *Hevern* declared unconstitutional a state statute requiring fingerprinting upon arrest, as a condition of bail, N.Y. Code Crim. Proc. § 552-a (McKinney Supp. 1969), ruling that the fingerprinting involved (1) compulsory self-incrimination, and (2) an unlawful encroachment upon the person. The first ground is clearly wrong, *see* note 25 *infra;* as to the second, the court noted that although it felt fingerprinting at the time still conveyed "an imputation of crime," at some future time it might lose such association. That development has clearly taken place. In any event, the passage of time and the intervening developments in statutory and case law within and without New York, *see* note 17 *supra;* appendix, considerably weaken the impact of these early lower court decisions.

[20] Executive Order No. 10450, 3 C.F.R. 936 (1949-53 Comp.).

[21] New York City Civil Service Commission requires fingerprinting both prior to examinations and again upon appointment or promotion. N.Y. City Civ. Serv. Comm'n, Rules 4.4.3, 5.1.2. *See* M. Itzkowitz & Sons v. Geraghty, 139 Misc. 163, 247 N.Y.S. 703, 705 (Spec. T. 1931).

[22] Maine Rev. Stat. Ann., tit. 25, § 1548 (1965).

and mothers fingerprinted.[23] The extensive acceptance of fingerprinting throughout the country is illustrated by a random selection of federal and state statutes set out in the appendix to this opinion which authorize or require fingerprinting. In sum, the public has long recognized it as a valuable and reliable means of identification, and to suggest that a stigma attaches when it is so used is to fly in the face of reality.

Plaintiffs' further contention that fingerprinting is an unwarranted invasion of their personal liberty or privacy is equally unjustified. Plaintiffs do not challenge the right of inquiry into their private lives when employed or seeking employment by the stock exchanges and affiliated clearing houses under existing SEC and Exchange regulations.[24] They attack only the fingerprinting requirement. But fingerprinting under the statute is only a means of verifying the required information as to the existence or nonexistence of a prior criminal record. It involves no additional intrusion into the personal lives of employees and applicants. The submission of one's fingerprints is no more an invasion of privacy than the submission of one's photograph or signature to a prospective employer,[25]

---

[23] Pa. Stat. Ann., tit. 35, § 352 (1964).

[24] *See* SEC Rule 17a-3(a)(12), 17 C.F.R. § 240.17a-3(a)(12) (1969); NYSE Rule 345.19, discussed at pp. 4-5 *supra*.

[25] *See* Schmerber v. California, 384 U.S. 757, 764 (1966), where, even with respect to the privilege against self-incrimination, the Supreme Court observed: " . . . both federal and state courts have usually held that it [the privilege] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *See also* Gilbert v. California, 388 U.S. 263, 266-67 (1967); Lewis v. United States, 382 F.2d 817 (D.C. Cir.), *cert. denied*, 389 U.S. 962 (1967) (handwriting exemplar).

which the Stock Exchange rules still require. As the Supreme Court in *Davis* observed, "Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search."[26] The actual inconvenience is minor; the claimed indignity, nonexistent; detention, there is none; nor unlawful search; nor unlawful seizure.

Taking a somewhat different tack, plaintiffs acknowledge that even under *Davis,* in noncriminal situations, a statute could require fingerprinting of certain persons, if narrowly circumscribed by appropriate standards to protect privacy.[27] But they claim that the statute here is overbroad and as applied fails to meet required constitutional standards, for it indiscriminately requires all persons in the securities business, regardless of circumstances, to submit his fingerprints.

These three plaintiffs, a lawyer, a computer programmer and an executive kitchen employee, urge there is no rational basis for their inclusion in the fingerprinting requirement. But even employees in the securities business who have no direct access to securities may be in contact with fellow employees having direct or immediate access to or knowledge of the location of negotiable securities running into astronomical figures. Theft of securities may be accomplished not only by those who handle certificates in the "back room," but by other employees who are in a position to conceive, aid and abet the crime, or to "finger" the securities or to arrange for outsiders to receive and sell the stolen certificates. As to the lawyer's

---

[26] Davis v. Mississippi, 394 U.S. 721, 727 (1969).

[27] *Cf.* Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

further contention that his good character was attested to when he was certified for admission to the bar,[28] the short answer is that it may be he "is well known to be of good character . . . but it is not practical . . . to make one rule for one applicant and another for the balance . . . ." [29] And even if some individuals with little or no access to the securities must still be fingerprinted, this does not invalidate legislation if otherwise there is justification for the course adopted by the state.[30] "The slight interference with the person involved in finger printing seems to us one which must be borne in the common interest." [31]

The plaintiffs next argue that the legislative purpose of reducing the crime potential could have been more effectively achieved by other means, such as an automated and centralized system of depositing shares so that the physical shares need not be transferred, and by other automated

---

[28] It should be noted that admission to the bar involves many of the same procedures plaintiff here finds objectionable. The New York State Board of Law Examiners requires a handwriting exemplar in the application for the bar examination. Rules of N.Y. State Bd. Law Examiners, Rule 1(c), N.Y. Codes, Rules & Regs., tit. 22, § 6000.1(c) (1969). The Committees on Character and Fitness of the Second Judicial Department in New York have a similar requirement for admission to the bar. *See* Application & Sworn Statement for Admission to the Bar, App. Div., 2d Dep't, Comms. on Character & Fitness, Quest. 13, N.Y. Codes, Rules & Regs., tit. 22, app. C-1 (1969). In the Second Department, applicants are also required to submit photographs and to be fingerprinted. *See also* Roesch v. Ferber, 48 N.J. Super. 231, 137 A.2d 61, 73 (1957) (fingerprints required of all candidates to New Jersey bar).

[29] M. Itzkowitz & Sons v. Geraghty, 139 Misc. 163, 247 N.Y.S. 703, 705 (Spec. T. 1931).

[30] *See* Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 82-83 (1946); Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 201-04 (1912); Otis v. Parker, 187 U.S. 606 (1903).

[31] United States v. Kelly, 55 F.2d 67, 68 (2d Cir. 1932).

methods. Whatever the merits of these as yet untried proposals, the remedy to be applied to the evil rests with the Legislature and not with the courts.[32]

Plaintiffs urge us not to give such broad scope to legislative discretion, but carefully to scrutinize the alternatives open to the Legislature, for "[w]hen a regulatory statute is so broadly drawn or applied as to infringe on individual rights, and where there are alternative methods of regulation less restrictive of those rights, such a statute may be unconstitutional [citing cases in the First Amendment area]." However, as plaintiffs have failed to establish any significant invasion of a protected privacy interest, there is no justification for applying a "less restrictive alternative" or other such stringent test ordinarily reserved for the "preferred" First Amendment rights.[33] Since the means adopted are reasonably related to the purposes sought to be achieved by the regulation, the legislative solution is beyond attack.

The plaintiffs next contend that the statute is vulnerable because no provision is made for the return or destruction of the fingerprints once they have served their purpose of verification. They argue that lack of such provision belies the stated purpose of the Act and reveals that its true purpose is (1) to use the fingerprints for continual surveillance of employees and to exclude from the securities industry persons deemed "undesirable," whether

---

[32] Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946); Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192 (1912); Staten Island Leaders, Inc. v. Waterfront Comm'n, 117 F. Supp. 308 (S.D.N.Y. 1953), *aff'd per curiam*, 347 U.S. 439 (1954).

[33] Shelton v. Tucker, 364 U.S. 479, 488 n.8 (1969); *see, e.g.*, NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, *supra;* Talley v. California, 362 U.S. 60 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

BLEED THROUGH POOR COPY

convicted of crime or not, and (2) to use the fingerprints for the detection of crime, thereby running afoul of *Davis* v. *Mississippi*. The first claim, based on mere conjecture,[34] is frivolous. Possession of an individual's fingerprints does not create an atmosphere of general surveillance or indicate that they will be used for an impermissible purpose. Fingerprints provide a simple means of identification; no more.

The second claim is equally conjectural and untenable. In any case, the most plaintiffs can posit here is that the potential use of the prints for future criminal investigations is an additional unstated purpose of the law; that they will in fact be used for the stated purpose of initial investigation cannot seriously be questioned. Given such an admittedly valid purpose so clearly within the legislative competence, the circumstance of an incidental future by-product of fingerprinting does not invalidate the legislative act. Nor does that circumstance warrant a court ascribing to the Legislature a purpose different from the one that led to its enactment. As has been so aptly put: "Judicial inquiries into [legislative] motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed." [35]

And even if plaintiffs were to succeed in establishing that the state intended to incorporate these fingerprints

---

[34] *Cf.* Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 84-85 (1946).

[35] Flemming v. Nestor, 363 U.S. 603, 617 (1960); *see also* Arizona v. California, 283 U.S. 423, 454-57 (1931); Nigro v. United States, 276 U.S. 332 (1928); United States v. Doremus, 249 U.S. 86 (1919).

into its central criminal identification files[36] to be used as a means of future crime detection, such a procedure does not run afoul of any constitutional prohibitions. As indicated above, the *Davis* case, so heavily relied upon, does not place any limitations upon the use of fingerprints properly obtained; it bars only unreasonable detentions for the purpose of obtaining such prints. Prints obtained in the course of criminal proceedings are routinely retained and used for future investigative purposes. Absent some statutory requirement of return or destruction upon acquittal[37] or some prejudicial classification attached thereto,[38] there is no constitutional requirement that prints properly obtained be returned.[39] The state having presented a valid justification under its police power for the original taking of the prints under reasonable circumstances, their use for future identification purposes, even in criminal investigations, is not impermissible.[40] The decision as to whether prints lawfully

---

[36] *See* N.Y. Exec. Law §§ 600-08 (McKinney Supp. 1969); Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 Mich. L. Rev. 1091, 1191 (1969).

[37] *See, e.g.*, N.Y. Code Crim. Proc. §§ 552-a, 944 (McKinney Supp. 1969).

[38] *See* United States v. Kalish, 271 F. Supp. 968 (D.P.R. 1967).

[39] Sterling v. City of Oakland, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962); Kolb v. O'Connor, 14 Ill. App. 2d 81, 142 N.E.2d 818 (1957); State *ex rel.* Mavity v. Tyndall, 225 Ind. 360, 74 N.E.2d 914 (1947), *appeal dismissed*, 333 U.S. 834, *rehearing denied*, 333 U.S. 858 (1948); *cf.* Herschel v. Dyra, 365 F.2d 17 (7th Cir.), *cert. denied sub nom.* Herschel v. Wilson, 385 U.S. 973 (1966). Campbell v. Adams, 206 Misc. 673, 133 N.Y.S.2d 876 (Spec. T. 1954), cited by plaintiffs, is not to the contrary. That case involved only interpretation of relevant New York statutes governing the taking and return of fingerprints.

[40] *See* Stevenson v. United States, 380 F.2d 590, 593-94 (D.C. Cir.), *cert. denied*, 389 U.S. 962 (1967).

obtained under the Act should be returned once they have served their purpose is a matter of legislative policy.

The plaintiffs' further claim that they are denied equal protection of the laws is patently frivolous. The contention is that employees in the securities business have been singled out for fingerprinting, whereas employees in other industries, such as banking, where embezzlement and theft are also rampant, are not required to be fingerprinted, and thus there is an invidious and irrational discrimination against securities industry employees. The mere statement of the contention requires its rejection. That other industries to which the Legislature has not applied the Act may present similar problems, if such be the fact, does not render it unconstitutional. The extension of the Act, if evils also exist in related industries, is a matter of legislative judgment and discretion. "If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.'"[41]

In sum, the Act neither invades the right of privacy of plaintiffs, nor does it in any respect deprive them of their constitutional rights of due process or of the equal protection of the laws.

The motion for the convening of a statutory three-judge court is denied; the temporary restraining order is vacated; the defendants' motion to dismiss the complaint is granted.

EDWARD WEINFELD
United States District Judge

Dated: New York, N. Y.
November 18, 1969

---

[41] West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937); *see* Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Gundling v. Chicago, 177 U.S. 183, 188 (1900).

APPENDIX

Selection of State and Federal Statutes Authorizing or Requiring Fingerprinting of Individuals in Noncriminal Contexts.

Conn. Gen. Stat. § 6-57 (1960) (unidentified dead bodies); *id.* § 14-44 (operators of public service motor vehicles); *id.* §§ 29-29, 53-206 (applicants for permit to carry pistol, revolver or other dangerous weapon).

Del. Code Ann., tit. 21, § 2763 (1953) (taxicab drivers); *id.*, tit. 24, § 1313 (Supp. 1968) (employees of licensed private detectives).

Fla. Stat. ch. 210.15(1)(e) (1967) (wholesale dealers and exporters of cigarettes); *id.* ch. 245.06 (unclaimed dead bodies); *id.* ch. 447.04(2)(a) (labor union business agents); *id.* ch. 493.42(2)(a)(10) ("detection of deception examiners," *i.e.* polygraph operators); *id.* ch. 550.181(2) (holders of racing permits and their employees); *id.* ch. 561.17(1) (manufacturers, dealers, distributors, etc. of alcoholic beverages).

Hawaii Rev. Laws § 32-8 (1957) (voluntary identification cards); *id.* § 160-43 (alternative thumbprint or photograph on drivers' licenses).

Ill. Rev. Stat., ch. 114, § 353 (1967) (licensed lessors of safe deposit boxes);

Iowa Code § 249.14 (1962) (alternative form of indorsement on old-age assistance warrants).

Md. Code Ann. art. 66½, § 89(c) (1967) (school bus and public common carrier drivers).

Mass. Laws Ann. ch. 140, §§ 122, 131 (1965) (licensees for sale, rental, lease, repair or carrying of firearms).

Mich. Comp. Laws §§ 28.271, 28.272 (1948) (voluntary request for fingerprinting to be complied with; separate non-criminal filing system to be maintained); *id.* § 28.426 (Supp. 1961) (licensees to carry concealed weapon); *id.* § 431.41 (Supp. 1961) (all persons connected with horse racing); *id.* § 445.472 (Supp. 1961) (pawnbrokers, second-hand and junk dealers to take fingerprints of individuals from whom they purchase or acquire goods).

Minn. Stat. § 326.333(3) (1961) (licensed private detectives and protective agents).

N. J. Stat. Ann. §§ 2A:151-35, 2A:151-44 (Supp. 1969) (permit holders for purchase of firearm or carrying of pistol or revolver; *id.* § 17:15A-3 (check-cashing licensees and every person directly connected with them); *id.* §§ 18A:39-17 to -19 (1968) (school bus drivers); *id.* § 45:19-16 (1963) (employees of licensed private detectives).

N. Y. Alcoholic Bev. Control Law §§ 103(6), 104(9) (McKinney Supp. 1969) (employees of alcoholic beverage manufacturers and wholesalers); N. Y. Gen. Bus. Law §§ 72, 81 (McKinney 1968) (licensed private investigators, watch, guard and patrol agencies and their employees); N. Y. Unconsol. Laws § 8010(1) (McKinney Supp. 1969) (participants and employees at harness race meets); *id.* § 8911(2) (McKinney 1961) (professional boxers and wrestlers, and referees, judges, matchmakers, timekeepers, box office employees, ticket takers, doormen, ushers, managers, trainers, seconds, announcers and special policemen at professional boxing or wrestling matches).

Okla. Stat. § 941 (1961) (corpse subject to examination after violent or suspicious death, or death relating to disease which might constitute public health hazard).

Relevant Statutes

New York State Civil Rights Law, 8 McKinney's Consol. Laws of N. Y. Supp. § 79-e provides:

> Upon the determination of a criminal action or proceeding against a person, in favor of such person, unless another criminal action or proceeding is pending against him or unless such person has previously been convicted in this state of a crime or of the offense of disorderly conduct or of being a vagrant or disorderly person or has previously been convicted elsewhere of any crime or offense which would be deemed a crime or the offense of disorderly conduct, vagrancy or being a disorderly person if committed within the state, every photograph of such person and photographic plate or proof and finger prints taken or made of such person while such action or proceeding is pending by direction or authority of any police officer, peace officer, or any member of any police department, and all duplicates and copies thereof shall be returned on demand to such person by the police officer, peace officer or member of any police department having any such photograph, photographic plate or proof, copy of duplicate in his possession or under his control; and such police officer, peace officer or member of any police department failing to comply with the requirements hereof, shall be guilty of a misdemeanor.

New York Code of Criminal Procedure, 66 McKinney's Consol. Laws of N. Y. Supp. § 944 provides:

> Upon the determination of a pending criminal action or proceeding against a person, in favor of such person, unless another criminal action or proceeding is pending against him or her or unless such person has previously been convicted in this state of a crime or of the offense of disorderly conduct or of being a vagrant or disorderly person or has previously been convicted elsewhere of any crime or offense which would be deemed a crime or the offense of disorderly conduct, vagrancy or being a disorderly person if committed within the state, his or her photograph, photographic plate or proof, fingerprint impressions, photographic copy or photographic plate taken or made while such action or proceeding is pending by direction or authority of any police officer, sheriff, peace officer, or any member of any police department, and all duplicates and copies made thereof during such action or proceeding, shall be returned on demand to such person by the police officer, sheriff, peace officer or any member of any police department having any such photograph, and fingerprints, photographic plate or proof, copy or duplicates in his possession, or under his control, and such police officer, sheriff, peace officer or member of police department failing to comply with the requirements hereof, shall be guilty of a misdemeanor.

New York State Labor Law, 30 McKinney's Consol. Laws of N. Y. § 201-a provides:

Except as otherwise provided by law, no person, as a condition of securing employment or of continuing employment, shall be required to be fingerprinted. This provision shall not apply to employees of the state or any municipal subdivisions or departments thereof, or to the employees of legally incorporated hospitals, supported in whole or in part by public funds or private endowment.

FILE COPY

FILED

APR 28 1970

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1386

DONALD J. MILLER,

Petitioner,

v.

NEW YORK STOCK EXCHANGE, AMERICAN STOCK EXCHANGE, PAINE, WEBBER, JACKSON & CURTIS and LOUIS LEFKOWITZ, Individually and as Attorney General of the State of New York,

Respondents.

BRIEF OF RESPONDENT NEW YORK STOCK EXCHANGE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD J. REILLY
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorney for Respondent New York Stock Exchange

Of Counsel:

MILBANK, TWEED, HADLEY & MCCLOY

INDEX

	PAGE
QUESTION PRESENTED	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
I The Courts below correctly held that the Statute constitutes a valid exercise of the police power	2
II Fingerprinting as a condition of employment does not infringe upon any constitutional right	4
III The judgment below does not conflict with the decisions of this or any other court, nor does it raise any issue meriting review by this Court	8
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

	PAGE
Borden's Co. v. *Ten Eyck*, 297 U. S. 251 (1934)	3
Camara v. *Municipal Court*, 387 U. S. 523 (1967)	6
Carmichael v. *Southern Coal & Coke Co.*, 301 U. S. 495 (1937)	2
Davis v. *Mississippi*, 394 U. S. 721 (1969)	5
Goldblatt v. *Hempstead*, 369 U. S. 590 (1962)	2
James v. *Goldberg*, 303 F. Supp. 935 (S. D. N. Y. 1969)	6
Olsen v. *Nebraska*, 313 U. S. 236 (1941)	3
Ex Parte Poresky, 290 U. S. 30 (1933)	9
South Carolina Highway Department v. *Barnwell Brothers*, 303 U. S. 177 (1938)	2
United States v. *Carolene Products Co.*, 304 U. S. 144 (1938)	2

Other Authorities

Chapter 1071, 1969 Laws of New York, New York General Business Law § 359-e(12)	1
N.Y.S.E. Rule 345.19	4
SEC Rule 17(a)-3(a)(12), 17 C. F. R. § 240.172-3(a)(12)	4

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1386

DONALD J. MILLER,

Petitioner,

v.

NEW YORK STOCK EXCHANGE, AMERICAN STOCK EXCHANGE, PAINE, WEBBER, JACKSON & CURTIS and LOUIS LEFKOWITZ, Individually and as Attorney General of the State of New York,

Respondents.

BRIEF OF RESPONDENT NEW YORK STOCK EXCHANGE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

Has any substantial federal question of constitutionality been presented with respect to a state statute requiring fingerprinting of persons employed in the securities business, which is admittedly a business affected with a vital public interest?

Statement of the Case

Petitioner, a lawyer formerly employed by respondent Paine, Webber, Jackson & Curtis, sued to obtain declaratory and injunctive relief against the operation of Chapter 1071, 1969 Laws of New York, New York General Business Law § 359-e(12) (hereinafter "the Statute"). As it per-

tains to petitioner, the Statute requires all New York employees of member firms of a national security exchange to be fingerprinted as a condition of employment. Petitioner contends that the Statute constitutes an invasion of privacy, an unlawful search and seizure and denial of due process of law and equal protection of the laws. Respondents opposed petitioner's motion to convene a three-judge court pursuant to 28 U.S.C. § 2280, and moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

The District Court for the Southern District of New York (Weinfeld, J.) denied petitioner's motion to convene a three-judge court and granted respondents' motion to dismiss the complaint (App. 27-48), and the Court of Appeals for the Second Circuit unanimously affirmed in a *per curiam* decision (App. 23-26).

Reasons for Denying the Writ

I

The courts below correctly held that the Statute constitutes a valid exercise of the police power.

When the constitutionality of any given exercise of a state's police power is challenged, only two questions arise: (1) Does the state have a legitimate interest in the matter subject to regulation? (2) Are the means chosen reasonably related to the purposes sought to be achieved by the regulation? *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594-95 (1962).

A legislative enactment pursuant to the police power carries a strong presumption of constitutionality, and is presumed to be supported by facts known to the Legislature. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 (1938); *South Carolina Highway Department* v. *Barnwell Brothers*, 303 U.S. 177, 191 (1938); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 509-510 (1937).

The function of the Courts is not to second-guess the Legislature on questions of the reasonableness, wisdom and propriety of regulatory legislation. *South Carolina Highway Department* v. *Barnwell Brothers, supra,* at p. 191; *Olsen* v. *Nebraska,* 313 U.S. 236, 246 (1941). The Courts may not substitute their judgment for that of the Legislature where there exists "any state of facts either known or which could reasonably be assumed" to support the action taken by the Legislature. *United States* v. *Carolene Products Co., supra,* at p. 154; *Borden's Co.* v. *Ten Eyck,* 297 U.S. 251, 263 (1934).

The Statute represents a reasonable exercise of the police power by the Legislature of the State of New York. The facts respecting the problem of theft in the securities industry, the efforts to deal with the problem by members of the industry and the purpose of the Statute are reviewed at length in what the Court of Appeals described as "Judge Weinfeld's thorough and well-considered opinion" and need not be repeated. Suffice it to say that the incidence of lost and stolen securities has increased dramatically in recent years, amounting to over $70,000,000 during 1967-1968 alone. Early in 1969 the New York Stock Exchange and other financial institutions formed a Joint Bank-Securities Industry Committee on Securities Protection to analyze the problem and make recommendations. The Statute was one of the recommendations of that Committee. The overall purpose of the Statute is to prevent theft and similar crimes in the securities industry and to render more difficult industry infiltration by elements of organized crime and by persons whose criminal records demonstrate sufficient unreliability to justify denial of their employment in the industry.

It is not, and cannot be, disputed that the securities industry is affected with a public interest, that there has developed a serious problem of lost and stolen securities in recent years and that the State of New York has a vital interest in taking steps reasonably designed to protect the

industry from crime. Obviously, one such step is to prevent the infiltration of the industry by persons whose criminal records demonstrate their unfitness for such employment. Under Federal law and the rules of the New York Stock Exchange employees or prospective employees of member firms of national security exchanges are presently required to disclose any criminal record (SEC Rule 17(a)-3(a)(12), 17 C. F. R. § 240.172-3(a)(12); N. Y. S. E. Rule 345.19). The Statute does no more than provide a simple and unobtrusive means to verify this information. As stated by Judge Weinfeld (App. 34-35):

> "Fingerprints have long been recognized as a scientific and accurate means of identification. The statute provides a simple method for security industry employers confronted with the problem of shifting personnel and mounting crime to verify at slight inconvenience to employees and applicants for employment the information submitted by them. Upon its face, it appears reasonably calculated to meet the evils toward which it was directed without imposing any undue burden upon individuals, and consequently represents a valid exercise of the state's police power." (Footnotes omitted)

Petitioner's contentions that the Statute is ineffective to accomplish its purpose and that there are alternate means of deterring or preventing loss and theft of securities raise questions for consideration and evaluation by the Legislature, and not by the courts or a particular litigant.

II

Fingerprinting as a condition of employment does not infringe upon any constitutional right.

Petitioner argues that the Statute is not a proper exercise of the police power because the requirement of fingerprinting in the securities industry is an unconstitutional invasion of the "right of privacy" under the Fourth

Amendment, a denial of equal protection of the laws and a denial of due process of law. These contentions are all based upon *Davis* v. *Mississippi*, 394 U. S. 721 (1969) and upon the premise that *Davis* established a constitutionally-protected right of privacy not to be fingerprinted except upon probable cause under the Fourth Amendment. Petitioner's reliance on the *Davis* case is misplaced because (1) it does not establish any right of privacy in the person's fingerprints and (2) it involved a detention and arrest in connection with a criminal investigation.

In *Davis* the police arrested or detained a group of youths, including petitioner, and fingerprinted them in order to find fingerprints matching those at the scene of a crime. Thereafter petitioner was again arrested without a warrant or probable cause, and again fingerprinted. After being identified by the latter fingerprints as the perpetrator of the crime, petitioner was tried and convicted. This Court reversed the conviction on the ground that petitioner's detention by the police for any purpose without probable cause constituted an unlawful search and seizure under the Fourth Amendment.

Contrary to petitioner's argument in this case, this Court in *Davis* did not declare any rule or principle that there exists a constitutionally-protected right of privacy in a person's fingerprints. It is clear that the Court was concerned not with the fingerprinting *per se*, but with the obtaining of evidence during improper detention. Thus, the Court stated that the only issue was whether petitioner's fingerprints should have been excluded from evidence "as the product of a detention which was illegal under the Fourth and Fourteenth Amendments" (394 U. S. at 722), *i.e.*, "whether the detention of petitioner during which the fingerprints used at trial were taken constituted an unreasonable seizure of his person in violation of the Fourth Amendment" (394 U. S. at 724-5). Noting that the purpose of the Fourth Amendment was to prevent wholesale

intrusions on the security of citizens "whether these intrusions be termed 'arrests' or 'investigatory detentions'" (394 U. S. at 726-7), and that "Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment" (394 U. S. at 727), the Court held that petitioner's arrest and subsequent detention were without warrant or probable cause and "were therefore constitutionally invalid" (394 U. S. at 725). The vice requiring reversal was not the fact that Davis was fingerprinted, but the fact that his arrest and detention were illegal, rendering inadmissible evidence (the fingerprints) obtained as a result thereof. The Court clearly did not recognize any right of privacy in a person's fingerprints, and in fact, explicitly left open the question whether, under some circumstances, the police might obtain the fingerprints of individuals for whom there is no probable cause to arrest without violating the Fourth Amendment (394 U. S. at 727-8).

The other cases cited in support of petitioner's Fourth Amendment contention are equally inapposite. *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), involved searches of private dwellings to find violations of housing or health laws and *James* v. *Goldberg,* 303 F.Supp. 935 (S.D.N.Y. 1969), concerned warrantless visits to homes of welfare recipients. Clearly the matters dealt with in such cases are in no way related, or even analogous, to the issues presented in this case. The Statute is simply intended to provide a means of verifying information required by law to be furnished by persons employed or seeking employment in the securities industry. The purpose of such requirements is not connected with the initiation or prosecution of criminal or enforcement proceedings, which is the concern of the search and seizure provision of the Fourth Amendment.

The requirement that a person submit his fingerprints as a condition of voluntary employment does not constitute a "search and seizure" under the Fourth Amendment. Virtually every employer requires a prospective employee

to furnish certain information concerning himself and his background, including such matters as his name, employment history, criminal record, family, residence, personal references, signature and the like. The eliciting of such information from one engaged in or seeking employment has never been considered a "search and seizure" under the Fourth Amendment. The fingerprinting requirement of the Statute is indistinguishable in purpose and effect from the requirement that an applicant furnish such other information, except that it is more reliable—a person can lie about his criminal record, but his fingerprints cannot. It is also more economical, less burdensome for employer and employee alike and far less an imposition on the employee's privacy than a full background investigation.

Petitioner's contentions based upon the fact that the Statute does not provide for the return of an employee's fingerprints are fully answered in Judge Weinfeld's opinion (App. 42-45). We might simply add that petitioner's position in this regard is based upon the untenable premises that there is a right of privacy in fingerprints and that fingerprinting is an unconstitutional search and seizure absent probable cause under the Fourth Amendment. It has never been held or even suggested that an employee has a constitutional right to the return of other information furnished to an employer as a condition of employment, and no reason appears why fingerprints should be treated differently. Nor are petitioner's contentions respecting restriction of the class to be fingerprinted or showing of need for fingerprinting (Petition 12-15) relevant to the constitutional issues. The necessity for legislation and the class of persons to be covered thereby are matters for the consideration of the Legislature.

Petitioner's other constitutional arguments may be dealt with briefly. The claim that fingerprinting employees in the securities industry constitutes an "invidious and irrational" discrimination (Petition 16) and therefore amounts to a denial of equal protection under the law approaches

the ridiculous when one considers the widespread use of fingerprinting today. Compulsory fingerprinting as a condition of employment or for purposes of identification, wholly unrelated to criminal proceedings, is a commonplace fact of life. The list of occupations which have been subjected to a fingerprinting requirement under federal, state or local statutes, ordinances and administrative orders is amazingly extensive. See Judge Weinfeld's opinion at App. 38-39, 46-48 (a portion of the appendix to Judge Weinfeld's opinion, listing state and federal fingerprinting requirements, was inadvertently omitted from the Appendix to the Petition; see 306 F.Supp. at 1013).

Petitioner's argument that the Statute denies him due process of law (Petition 16-19) appears to be, in substance, that the Statute is unreasonably broad and that there are alternative means to prevent theft in the securities industry. As already noted, these are considerations for the Legislature, not the courts. Moreover, the argument is based on the presumption that there exists a constitutionally-protected right of privacy in fingerprints, a contention which is untenable for the reasons above stated.

III

The judgment below does not conflict with the decisions of this or any other court, nor does it raise any issue meriting review by this Court.

Davis v. *Mississippi, supra,* upon which all of petitioner's constitutional arguments are based, does not support the novel proposition that there exists a constitutionally-protected right of privacy in fingerprints or that fingerprinting *per se* constitutes a search and seizure under the Fourth Amendment. Petitioner has not cited any decision of this Court with which the judgment below conflicts, and this respondent is unaware of any decision supporting petitioner's position. On the contrary, statutes requiring fingerprinting of employees in various industries affected

with a public interest have been upheld in numerous decisions, of both state and federal courts, cited and discussed in Judge Weinfeld's opinion (App. 36-38, footnotes, 17, 19). As is fully established in Judge Weinfeld's opinion, petitioner's claims that the Statute infringes upon his constitutional rights are wholly without merit.

Since the complaint fails to raise any substantial constitutional issue, the decision of the District Court dismissing the action, unanimously affirmed by the Court of Appeals, was correct. *Ex Parte Poresky,* 290 U.S. 30 (1933).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD J. REILLY
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorney for Respondent
New York Stock Exchange

Of Counsel:

MILBANK, TWEED, HADLEY & MCCLOY

FILE COPY

FILED
MAY 2 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1386

DONALD J. MILLER,

Petitioner,

against

NEW YORK STOCK EXCHANGE, AMERICAN STOCK EXCHANGE, PAINE, WEBBER, JACKSON and CURTIS, and LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION FOR RESPONDENT ATTORNEY GENERAL

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Respondent
80 Centre Street
New York, N. Y. 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BRENDA SOLOFF
Assistant Attorney General
of Counsel

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570



BLEED THROUGH, POOR COPY

TABLE OF CONTENTS

	PAGE
Question Presented	1
Statement	2
A. The Pleadings	2
B. The District Court Opinion	3
C. The Opinion of the Court of Appeals	6
REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED:	
The Courts below correctly held that the claim that Chapter 1071 of New York Laws of 1969 establishes an unreasonable invasion of privacy and a denial of the equal protection of the laws is so insubstantial as not to require the convening of a three-judge court. Accordingly, the petition presents no issue requiring review by this Court	7
1. Chapter 1071 is reasonably calculated to meet a specific problem in an industry affected with a public interest	7
2. Chapter 1071 does not violate the right of privacy or any other constitutional right of petitioner	11
3. The statute is not a denial of equal protection of the laws	14
Conclusion	15

CASES CITED

PAGE

Matter of Barsky v. *Board of Regents*, 305 N. Y. 89 (1953) *aff'd* 347 U. S. 439 8

Bridges v. *State*, 247 Wis. 350, 19 N. W. 2d 529 (1945) 9, 13

Bynum v. *United States*, 262 U. S. 465 (D. C. Cir. 1958) 11

California Water Service Co. v. *City of Redding*, 304 U. S. 252 (1938) 15

Camara v. *Municipal Court*, 387 U. S. 530 12

Davis v. *Mississippi*, 394 U. S. 721 11

DeVeau v. *Braisted*, 5 N. Y. 2d 236 (1959) aff'd 363 U. S. 144, *reh. den.* 364 U. S. 856 (1960) 8

Ferguson v. *Skrupa*, 372 U. S. 726 9

Friedman v. *Valentine*, 177 Misc. 437, 30 N.Y.S. 2d 891 (Sup. Ct. N. Y. Co. 1941), *aff'd* 266 App. Div. 561, 42 N.Y.S. 2d 593 (1st Dept. 1943) 9

Green v. *Board of Elections*, 380 F. 2d 445 (2d Cir. 1967), *cert. denied* 389 U. S. 108 15

Griswold v. *Connecticut*, 381 U. S. 479 ..... 5, 12

Goldblatt v. *Town of Hempstead*, 369 U. S. 590 8

Hansson v. *Harris*, 252 S. W. 2d 600 (Ct. Civ. App. Tex. 1952) 13

Idlewild Bon Voyage Liquor Corp. v. *Epstein*, 370 U. S. 713 15

James v. *Goldberg*, 303 F. Supp. 935 (S.D.N.Y. 1969), prob. jur. noted —— U. S. ——, 38 U.S.L. Week 3319 (Feb. 24, 1970) 12

Kemp v. *Hults*, 17 N. Y. 2d 191 (1966), *app. dism.* 385 U. S. 17 8

PAGE

Linehan v. *Waterfront Commission*, 116 F. Supp. 683 (S.D.N.Y. 1953), *aff'd* 347 U S. 420 ..... 8, 14

McGowan v. *Maryland*, 366 U. S. 420 8

Mapp v. *Ohio*, 367 U. S. 643 (1961) 11

Norman v. *Las Vegas*, 64 Nev. 38, 177 P. 2d 442 (1947) 9

Ex Parte Poresky, 290 U. S. 30 15

Schmerber v. *California*, 384 U. S. 767 12

Simone v. *Kennedy*, 26 Misc. 2d 748, 212 N.Y.S. 2d 838 (Spec. Term. N. Y. Co. 1961) 9

Smith v. *United States*, 324 F. 2d 879 (D. C. Cir. 1963) 11

State v. *Kuhl*, 175 P. 190, 3 A.L.R. 1694 (Nev. 1918) 9

State ex rel. Mavity v. *Tyndall*, 66 N. E. 2d 755 (Ind. 1946), approved 74 N. E. 2d 914, *app. dism.* 333 U. S. 84 ..... 9, 13

Staten Island Loaders Inc. v. *Waterfront Commission*, 117 F. Supp. 308 (S.D.N.Y. 1953), *aff'd* 347 U. S. 439 8

Sterling v. *City of Oakland*, 24 Cal. Rptr. 696 (D. Ct. App. 1962) 13, 14

Stevenson v. *United States*, 380 F. 2d 590 (D. C. Cir.) *cert. denied* 389 U. S. 962 ..... 9, 13, 14

Swift & Co. v. *Wickham*, 382 U. S. 111 15

United States v. *Carolene Products Co.*, 304 U. S. 144 8

United States v. *Kelly*, 55 F. 2d 67 (2d Cir. 1932) ... 9, 13

United States v. *Krapf*, 285 F. 2d 647 (3rd Cir. 1960) 13

West Coast Motel Co. v. *Parrish*, 300 U. S. 370 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1386

DONALD J. MILLER,

Petitioner,

against

NEW YORK STOCK EXCHANGE, AMERICAN STOCK EXCHANGE, PAINE, WEBBER, JACKSON and CURTIS, and LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT ATTORNEY GENERAL

Question Presented

Was a three-judge District Court required to hear petitioner's claim that Chapter 1071 of the New York Laws of 1969, requiring the fingerprinting of all employees of firms affiliated with national securities exchanges, violates his right of privacy as protected by the Fourth and Fourteenth Amendments to the Constitution and also violates his right to equal protection of the laws?

Statement

Petitioner instituted this suit in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief against the enforcement of the then newly-enacted Chapter 1071 of the New York Laws of 1969 (General Business Law, § 359-e). He sought a three-judge district court to determine the constitutionality of the statute, which requires the fingerprinting of employees of firms which are members of national securities exchanges.*

A. The Pleadings

Relying for jurisdiction on the Civil Rights Act (42 U.S.C. § 1983), the complaint set forth four causes of action. It contended first, that the statute works on invasion of privacy under the Ninth and Fourteenth Amendments to the United States Constitution, second, that it "is an illegal search and seizure" under the Fourth and Fourteenth Amendments to the Constitution, third, that "it is a punishment without due process of law" and, fourth, that "it creates an invidious and irrational discrimination against employees of firms affiliated with a National Security Exchange, and thereby denies the plaintiff the equal protection of the laws under the Fourteenth Amendment to the Constitution."

In support of these causes of action, petitioner alleged that he was an attorney employed by the firm of Paine, Webber, Jackson and Curtis "as a specialist in surveillance of firm activities to insure compliance with firm policies and applicable laws and regulations", and asserted that he did "not work directly handling money or securities."

---

* Petitioner's case was heard and decided with a companion case, *Thom, et ano.* v. *New York Stock Exchange, et al.*, 69 Civ. 4092 (S.D.N.Y.), which was not appealed.

The complaint was brought on by order to show cause and a temporary restraining order was signed restraining "the defendants, under FRCP Rule 65, during the pendency of this litigation, from fingerprinting the plaintiff and/or from dismissing the plaintiff from employment for failure or refusal to be fingerprinted, . . ."

Respondents moved to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim on which relief could be granted. F. R. Civ. Proc. 12(b)(1), (6).

B. The District Court Opinion

In an extensive and carefully reasoned opinion, the Hon. Edward Weinfeld denied petitioner's motion to convene a three-judge court, granted respondents' motion to dismiss the complaint and vacated the temporary restraining order. In doing so, Judge Weinfeld recognized that he was concerned only with "[t]he single narrow issue" of whether the complaint contained "the necessary constitutional substance" to require the convening of a three-judge court. He concluded that it did not (30-31).*

Judge Weinfeld first considered the evils "that have bedeviled an industry and concerned the state—the year by year increase in stolen or lost securities" (31). He pointed out that the volume of transactions on the New York Stock Exchange alone rose 75% between 1963 and 1968 and that in the single year between 1967 and 1968 volume rose from an average of 10 million to an average of 13 million shares a day, an increase of 30% (31). He added that the number of employees was also growing. It was close to 50,000 in 1969 with 6,000 having been added in 1968 and, that year, there were about 10,000 applicants for positions in the industry (31).

---

*Numbers in parentheses refer to the pages in the petition for certiorari which contain the District and Circuit Court opinions.

It was found that, during this time of increasing volume and personnel, the number of stolen or lost securities was "staggering", soaring from a total value of $9 million in 1966 to $37 million both in 1967 and in 1968 (31-32). Moreover, "[t]he depredations involved not only persons who had immediate access to the securities, but others who illicitly received and disposed of them" (32).

The court stated that previous procedures for learning about the background of employees "had not proved altogether effective" (32) even though both the SEC and the New York Stock Exchange had rules requiring extensive information to be provided by the employee plus a photograph and signature exemplar. 17 C.F.R. § 240.17a-3(a)(12) (1969); N.Y.S.E. Rule 345.19. The Court found that:

> "Despite these regulations, theft of securities occurred involving employees with criminal records undisclosed at the time of their employment." (32)

Chapter 1071 was, thus, found to be designed to deal with "a specific and worsening problem" (34).

In turning to the claims raised against the statute, Judge Weinfeld started from the premise, which was undisputed, that "the securities industry is a business affected with a public interest and that the state has a legitimate concern with the problem of ever-mounting thefts in the industry . . ." (34). He termed the power of the state to combat crime in the industry by establishing a means of identifying employees with criminal backgrounds "not open to challenge" and found fingerprinting a way "to verify at slight inconvenience . . . the information submitted . . ." (34).

Judge Weinfeld then meticulously analyzed and rejected each of petitioner's attacks on the statute, first distinguishing the case on which petitioner principally relied, *Davis* v. *Mississippi*, 394 U. S. 721. He pointed out that that

case concerned the methods by which evidence was obtained of criminal activity, specifically the dragnet arrest and detention of persons for fingerprinting in connection with a particuar investigation. He found that case to be "but another application of the principle that the Fourth Amendment applies to all searches and seizures of the person no matter what the scope or duration" (36). The Court also found the right of marital privacy at issue in *Griswold* v. *Connecticut*, 381 U. S. 479 "in no sense analogous" (36) to petitioner's claim.

Citing an extensive array of authority, the Court rejected the contention that fingerprinting is an affront to dignity giving numerous examples of its use in non-criminal connections (36-39) and concluding that "the public has long recognized it as a valuable and reliable means of identification, and to suggest that a stigma attaches when it is so used is to fly in the face of reality" (39).

Judge Weinfeld also held the claim that fingerprinting is an "unwarranted invasion of . . . personal liberty or privacy is equaly unjustified" (39). He pointed out that it was used only to verify information required to be given, a requirement itself not challenged, and that it was no more an invasion of a privacy than the photograph or signature also required (39).

The claim that the statute is overbroad because it does not distinguish among the various positions in the industry was rejected:

> "Even employees in the securities business who have no direct access to securities may be in contact with fellow employees having direct or immediate access to or knowledge of the location of negotiable securities running into astronomical figures. Theft of securities may be accomplished not only be those who handle certificate in the 'back room' but by other employees who are in a position to conceive, aid and abet

> the crime or to 'finger' the securities or to arrange for outsiders to receive and sell the stolen certificates." (40)

Judge Weinfeld said that it was for the Legislature to weigh petitioner's proposal that the securities industry be automated in lieu of fingerprinting (41-42).

He also found that since the petitioner had failed "to establish any significant invasion of a protected privacy interest" a stringent test "ordinarily reserved for the 'preferred' First Amendment rights" was not required and that "the means adopted are reasonably related to the purpose sought to be achieved . . ." (42).

The Court found no substance to the claim that the absence of a provision for return of the fingerprints made the statute unconstitutional, pointing out that there is no limitation on the use of fingerprints properly obtained and no prejudicial classification attaches to the fingerprints which are obtained (43-44). The Court regarded as frivolous and conjectural the claim that the statute was meant to create an atmosphere of general surveillance (42-43).

Finally, Judge Weinfeld held the claim that the statute worked a denial of the equal protection of the laws to be "patently frivolous" (45). He pointed out that the fact that other industries to which the Legislature has not applied the act may present similar problems did not render the act unconstitutional and its extension "if evils also exist in related industries" was a matter of legislative judgment (45).

C. The Opinion of the Court of Appeals

After the complaint was dismissed and the temporary restraining order dissolved, respondent was discharged

by the respondent Paine, Webber, Jackson and Curtis, at least in part for instituting the instant action. The Court of Appeals affirmed the Circuit Court on Judge Weinfeld's "thorough and well-reasoned opinion" (25) adding that it was not necessary for him to have convened a three-judge court to reach his decision (25). The Court also stated that its decision was not to be read to foreclose a claim by petitioner that his discharge for instituting that action was unlawful although no inference was to be drawn "that such a claim would be legally sustainable" (26).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

The Courts below correctly held that the claim that Chapter 1071 of New York Laws of 1969 establishes an unreasonable invasion of privacy and a denial of the equal protection of the laws is so insubstantial as not to require the convening of a three-judge court. Accordingly, the petition presents no issue requiring review by this Court.

1. Chapter 1071 is reasonably calculated to meet a specific problem in an industry affected with a public interest.

The New York statute requiring the fingerprinting of employees of the securities industries is the direct result of a steadily worsening problem of crime in the industry aggravated by increased volume of business and increased personnel (*supra,* pp. 3-4). Petitioner did not dispute below, and does not dispute here, the power of the State to pass legislation with respect to a business affected with the public interest. He does not deny that the securities industry is such a business or dispute the underlying facts found by the District Court. Finally, he does not dispute either the right of an employer to know of any prior criminal background or the relevance of such information

to attempts to cope with the problems engendered by the mounting volume, mounting and shifting personnel and mounting crime. See e.g., *DeVeau* v. *Braisted*, 5 N. Y. 2d 236 (1959), aff'd 363 U. S. 144, *reh. den.* 364 U. S. 856; *Matter of Barsky* v. *Board of Regents*, 305 N. Y. 89 (1953), *aff'd* 347 U. S. 442; *Staten Island Loaders Inc.* v. *Waterfront Commission*, 117 F. Supp. 308 (S.D.N.Y. 1953), *aff'd* 347 U. S. 439 (1954); *Linehan* v. *Waterfront Commission*, 116 F. Supp. 683 (S.D.N.Y. 1953), *aff'd* 347 U. S. 439; *Kemp* v. *Hults*, 17 N. Y. 2d 191 (1966), *app. dism.* 385 U. S. 17.

Thus, petitioner's complaint comes down to the fact that, although he recognizes both the right of the State to protect the securities industry and also the relevance of prior criminal backgrounds to such protection, he quibbles with the legislative determination that fingerprinting is a proper and necessary course to implement that power and to cope with that problem. However, as the District Court properly found, the legislative determination is presumed valid and is not to be upset unless there is a total lack of rational connection between the statute and the problem to be solved. *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590, 594-595; *McGowan* v. *Maryland*, 366 U. S. 420 (1961); *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938).

The securities industry is closely regulated, controlling as it does the fortunes not only of the very rich but of the ever-increasing numbers of small investors. The Legislature, in an attempt to meet the challenge of organized crime and the depredations of other criminals drawn to the honeycomb of readily accessible negotiable securities, has sought to provide insulation from these assaults within the industry itself by the double-check on personnel information afforded by fingerprints. It is frivolous to challenge the new law in view of the public interest in the

industry and its problems and the close relationship of the statute to those problems. *Ferguson* v. *Skrupa,* 372 U. S. 726.

Fingerprinting is the simplest, least intrusive and most accurate means of verifying the information required to be provided. As a scientific method, it is virtually foolproof and as a physical inconvenience, it is minimal. *Stevenson* v. *United States,* 380 F. 2d 590 (D. C. Cir.), *cert. denied* 389 U. S. 962; *United States* v. *Kelly,* 55 F. 2d 67 (2d Cir. 1932); *State* v. *Kuhl,* 175 P. 190, 3 A.L.R. 1694 (Nev. 1918).

The efficacy of fingerprinting has made it a widely used technique in a variety of non-criminal situations. See *Friedman* v. *Valentine,* 177 Misc. 437, 30 N.Y.S. 2d 891 (Sup. Ct. N. Y. Co. 1941), *aff'd* 266 App. Div. 561, 42 N.Y.S. 2d 593 (1st Dept. 1943) and *Simone* v. *Kennedy,* 26 Misc. 2d 748, 212 N.Y.S. 2d 838 (Special Term N. Y. Co. 1961), upholding fingerprinting of cabaret employees. The Supreme Court of Nevada has upheld the fingerprinting of persons involved in selling alcoholic beverages. *Norman* v. *Las Vegas,* 64 Nev. 38, 177 P. 2d 442 (1947). Indeed, it "has become customary and considered appropriate in private industry as well as in public service and institutions, to take photographs and fingerprints of individuals, who are connected therewith or detained therein, for their identification for many other purposes or respects than any criminal matters." *Bridges* v. *State,* 247 Wis. 350, 19 N. W. 2d 529 (1945).

In New York and, indeed, in most states there is a wide-ranging spectrum of enterprises, private and public, which have found fingerprinting to be a useful means of identifying persons with criminal backgrounds where such information is relevant. See *Friedman* v. *Valentine, supra,* 30 N.Y.S. 2d at 896; *State ex rel. Mavity* v. *Tyndall,* 66 N. E. 2d 755 (Ind. 1946), *approved* 74 N. E. 2d 914, *app. dism. for want of a substantial question* 333 U. S. 84. The prob-

to attempts to cope with the problems engendered by the mounting volume, mounting and shifting personnel and mounting crime. See e.g., *DeVeau* v. *Braisted*, 5 N. Y. 2d 236 (1959), aff'd 363 U. S. 144, *reh. den.* 364 U. S. 856; *Matter of Barsky* v. *Board of Regents*, 305 N. Y. 89 (1953), *aff'd* 347 U. S. 442; *Staten Island Loaders Inc.* v. *Waterfront Commission*, 117 F. Supp. 308 (S.D.N.Y. 1953), *aff'd* 347 U. S. 439 (1954); *Linehan* v. *Waterfront Commission*, 116 F. Supp. 683 (S.D.N.Y. 1953), *aff'd* 347 U. S. 439; *Kemp* v. *Hults*, 17 N. Y. 2d 191 (1966), *app. dism.* 385 U. S. 17.

Thus, petitioner's complaint comes down to the fact that, although he recognizes both the right of the State to protect the securities industry and also the relevance of prior criminal backgrounds to such protection, he quibbles with the legislative determination that fingerprinting is a proper and necessary course to implement that power and to cope with that problem. However, as the District Court properly found, the legislative determination is presumed valid and is not to be upset unless there is a total lack of rational connection between the statute and the problem to be solved. *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590, 594-595; *McGowan* v. *Maryland*, 366 U. S. 420 (1961); *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938).

The securities industry is closely regulated, controlling as it does the fortunes not only of the very rich but of the ever-increasing numbers of small investors. The Legislature, in an attempt to meet the challenge of organized crime and the depredations of other criminals drawn to the honeycomb of readily accessible negotiable securities, has sought to provide insulation from these assaults within the industry itself by the double-check on personnel information afforded by fingerprints. It is frivolous to challenge the new law in view of the public interest in the

BLEED THROUGH POOR COPY

industry and its problems and the close relationship of the statute to those problems. *Ferguson* v. *Skrupa,* 372 U. S. 726.

Fingerprinting is the simplest, least intrusive and most accurate means of verifying the information required to be provided. As a scientific method, it is virtually foolproof and as a physical inconvenience, it is minimal. *Stevenson* v. *United States,* 380 F. 2d 590 (D. C. Cir.), *cert. denied* 389 U. S. 962; *United States* v. *Kelly,* 55 F. 2d 67 (2d Cir. 1932); *State* v. *Kuhl,* 175 P. 190, 3 A.L.R. 1694 (Nev. 1918).

The efficacy of fingerprinting has made it a widely used technique in a variety of non-criminal situations. See *Friedman* v. *Valentine,* 177 Misc. 437, 30 N.Y.S. 2d 891 (Sup. Ct. N. Y. Co. 1941), *aff'd* 266 App. Div. 561, 42 N.Y.S. 2d 593 (1st Dept. 1943) and *Simone* v. *Kennedy,* 26 Misc. 2d 748, 212 N.Y.S. 2d 838 (Special Term N. Y. Co. 1961), upholding fingerprinting of cabaret employees. The Supreme Court of Nevada has upheld the fingerprinting of persons involved in selling alcoholic beverages. *Norman* v. *Las Vegas,* 64 Nev. 38, 177 P. 2d 442 (1947). Indeed, it "has become customary and considered appropriate in private industry as well as in public service and institutions, to take photographs and fingerprints of individuals, who are connected therewith or detained therein, for their identification for many other purposes or respects than any criminal matters." *Bridges* v. *State,* 247 Wis. 350, 19 N. W. 2d 529 (1945).

In New York and, indeed, in most states there is a wide-ranging spectrum of enterprises, private and public, which have found fingerprinting to be a useful means of identifying persons with criminal backgrounds where such information is relevant. See *Friedman* v. *Valentine, supra,* 30 N.Y.S. 2d at 896; *State ex rel. Mavity* v. *Tyndall,* 66 N. E. 2d 755 (Ind. 1946), *approved* 74 N. E. 2d 914, *app. dism. for want of a substantial question* 333 U. S. 84. The prob-

COPY BOUND CLOSE IN CENTER

lems in the securities industry are at least as serious as those in the industries in which fingerprinting has already been used and in which it has been upheld. A number of state statutes provide for fingerprinting for at least some employees of the securities industry. See Rules of Florida Securities Commission, Chapter 330-3.09; Uniform Securities Act, Idaho Code, 1967, Special Supplement, Title 30, Chapter 14 as amended, § 30-1407; Kansas Administrative Regulations, Article 3, § 81-3-1(c); Nevada Revised Statutes, § 90.130; New Jersey Regulations, Part III, Rule 2; South Dakota Regulations Promulgated by the Commissioner of Securities Part IV-C; District of Columbia Code, 1965, Title 2, Chapter 24, Regulations, Rule 5a-3.

Petitioner's contention that the statute is overbroad in that it requires too many people to be fingerprinted for too little reason rests on the claim that he did not personally handle money and securities and that the industry had previously other more intensive investigation techniques for bonded employees. In addition, he contends that other methods, including, apparently, complete automation of the securities industry, are available. The short answer is that the prior investigative scope obviously was inadequate.

Clearly, if the criminal problem is mounting in the industry, limiting investigation only to persons directly handling monies and securities is not sufficiently effective. On the other hand, a full scale investigation of every employee would be administratively, economically and physically impossible, and even if it could be undertaken, would represent a much greater intrusion on privacy than the simple fingerprinting technique enacted by the Legislature. The hearing procedure proposed in this Court (Pet. p. 15) would similarly be broader than the fingerprinting, or, at the least would be a more time-consuming and less sure way to elicit the same information.

The argument that this particular statute is overbroad is, indeed, somewhat inconsistent with petitioner's position

BLEED THROUGH POOR COPY

since, as we have said, he does not dispute the right of an employer to ask him whether or not he has a prior criminal record or to have his photograph or a sample of his signature. The suggestion that the securities industry can be completely automated hardly solves the problems of today even if one day this suggestion should become a reality.

Finally, the suggestion that the statute does not serve a valid purpose because some people charged with securities crimes do not have criminal records does not prove the point. It does not obviate the likelihood that other people will have been so involved and does not disprove the statement by Governor Rockefeller in approving this bill that:

> "[S]everal securities thefts from member organizations of registered national security exchanges have been perpetrated with the aid of new back office or clerical employees with previously undisclosed criminal records." 2 McKinney's 1964 Laws of N. Y. 2575, 2576.

2. Chapter 1071 does not violate the right of privacy or any other constitutional right of petitioner.

Petitioner's attempt to attribute constitutional significance to his distaste for the fingerprinting requirement borders on frivolity and the authority on which he relies is clearly inapposite. Thus, he relies on *Davis* v. *Mississippi*, 394 U. S. 721, involving a dragnet procedure to secure fingerprints as evidence of crime, in an attempt to sustain a claim that he is the victim of an illegal search and seizure. That case is so irrelevant to a consideration of the statute as to demonstrate the wholly untenable character of plaintiff's challenge. It represents simply another example of the enforcement of the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), as a deterrent to unreasonable police behavior. See also *Bynum* v. *United States*, 262 U. S. 465 (D. C. Cir. 1958). Cf. *Smith* v. *United States*, 324 F. 2d 879 (D. C. Cir. 1963). It was not the obtaining of finger-

prints as such which prompted the *Davis* decision, but rather the police procedures employed to obtain what could have been any kind of evidence.

Thus, neither *Davis* nor any other decision lends substance to the complaint. The administrative search warrant cases, *Camara* v. *Municipal Court,* 387 U. S. 530 and *James* v. *Goldberg,* 303 F. Supp. 935 (S.D.N.Y. 1969), *prob. jur. noted* —— U. S. ——, 38 U.S.L. Week 3319 (Feb. 24, 1970), deal with the necessity of obtaining search warrants to make entries into the home in certain circumstances. They do not proscribe entries with warrants and petitioner only in this Court suggests that a warrant procedure is what he is seeking. However, such a result is absurd here.

The standard enunciated by this Court for the assessment of physical intrusions for blood test purposes is applicable here:

> "The Fourth Amendment's proper function is to restrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Schmerber* v. *California,* 384 U. S. 767, 768.

As we stated, the circumstances are entirely justified and there is no complaint against the manner in which the fingerprints are to be taken.

Similarly, petitioner's assertion that some right of privacy of his is invaded by the fingerprinting technique is untenable. He does not really state why fingerprinting is an invasion of privacy relying instead on *Griswold* v. *Connecticut,* 381 U. S. 479, which is not authority to impair the fingerprinting requirement and on an assertion that the numbers involved render it an invasion of privacy. Yet of the 100,000 people thus far fingerprinted few have protested the practice and it has gone swiftly and smoothly as it does for civil service and federal government em-

BLEED THROUGH, POOR COPY

ployees. An invasion of privacy implies that some information is being obtained which is not relevant to legitimate purposes, or that information is being published beyond relevant purposes, or that some physical instrusion into an area or person is being unreasonably made. None of these possible objections is sustainable in this case.

First, as we stated, petitioner does not contend that prior criminal backgrounds are irrelevant or that he has a right to withhold information concerning such background. Thus, since fingerprinting merely verifies information which is required to be supplied in any event, it is not the obtaining of information which may not be obtained. Moreover, there is to be no publication of the records such as there would be in exhibiting a photograph in a rogues' gallery. See *State ex rel. Mavity* v. *Tyndall, supra; Hansson* v. *Harris,* 252 S. W. 2d 600 (Court of Civil Appeals, Texas 1952); *Sterling* v. *City of Oakland,* 24 Cal. Reptr. 696 (D. C. App. 1962). Indeed, unlike photographs, fingerprints are meaningless unless deciphered by an expert. *Sterling* v. *City of Oakland, supra.* Thus, there is no invasion of privacy simply by virtue of the taking of fingerprints. Moreover, there is no physical invasion of privacy such as to render the process itself unreasonable. *United States* v. *Kelly,* 55 F. 2d 67 (2d Cir. 1932); *Bridges* v. *State, supra; Sterling* v. *City of Oakland, supra.* The taking of fingerprints does not represent a stigma, an indignity or a punishment. *United States* v. *Krapf,* 285 F. 2d 647 (3rd Cir. 1960); *Sterling* v. *City of Oakland, supra; Bridges* v. *State, supra.*

Petitioner's suggestion that the purpose of the statute is broader than to identify persons with prior criminal backgrounds is unsupported, even in the absence of the requirement that the fingerprints be returned. There is no constitutional requirement for such a procedure and no government agency does return them. *Stevenson* v. *United States,* 380 F. 2d 590 (D. C. Cir.) *cert. denied* 389

COPY FOUND CLOSE IN CENTER

U. S. 962; *Sterling* v. *City of Oakland, supra.* Moreover, the fact that the prints were taken will not in the future be a source of humiliation or stigma since unlike fingerprinting for criminal charges, there is no stigma attached to having been fingerprinted for employment purposes. Accordingly, the safeguards accorded in New York to persons acquitted of crimes, even if they were constitutionally required, which they are not (*Stevenson* v. *United States, supra; Sterling* v. *City of Oakland, supra*), are not required here.

3. The statute is not a denial of equal protection of the laws.

Petitioner also claims that he has been denied equal protection of the laws claiming that theft and embezzlement are problems in many industries which do not require fingerprinting. In fact, as we have stated in Point I, *supra,* many industries do require fingerprinting or it is required of them by law. Moreover, the fact that the State has chosen to operate on an industry by industry basis as investigation discloses the need for a fingerprinting procedure does not make the State action irrational or invidious but, rather, supports the validity of its action. *West Coast Motel Co.* v. *Parrish,* 300 U. S. 370, 400.

Finally, of course, the securities industry is closely regulated both under federal and state statutes—a fact which distinguishes this industry from the general run of business. In such industries employees may be required to meet additional scrutiny if they elect to seek such employment. See e.g., *Linehan* v. *Waterfront Commission of N. Y. Harbor,* 116 F. Supp. 439 (D.C.N.Y. 1953), *aff'd* 347 U. S. 439, *reh. den.* 347 U. S. 994. The host of state statutes containing fingerprint requirements in regulated industries or occupations is set out in the appendix to Judge Weinfeld's opinion. Whether fingerprinting should be a required procedure for employment in other regulated

industries, which may have similar problems is, as Judge Weinfeld stated "a matter of legislative judgment", not rising to the dignity of a constitutional objection.

In view of the obvious insubstantiality of the issue presented, there was no need to convene a three-judge court. *Swift & Co.* v. *Wickham*, 382 U. S. 111, 115; *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713, 715; *California Water Service Co.* v. *City of Redding*, 304 U. S. 252, 255; *Ex Parte Poresky*, 290 U. S. 30; *Green* v. *Board of Elections*, 380 F. 2d 445 (2d Cir. 1967), *cert. denied* 389 U. S. 1048. Petitioner's suggestion that there are issues of fact to be resolved reflects no more than a restatement of his legal theory which in turn is based on speculation with no foundation in fact.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, April 28, 1970.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Respondent

Samuel A. Hirshowitz
First Assistant Attorney General

Brenda Soloff
Assistant Attorney General
of Counsel